1990

Alta Industries - Utah, Inc. v. Lynn P. Hurst, Wasatch Steel, Inc. : Brief of Appellant

Utah Supreme Court

L. R. Gardiner, Jr.; Suzanne K. Cavanaugh; Gardiner and Hintze; Attorneys for Appellants.
Bruce A. Maak; Kimball, Parr, Waddoups, Brown and Gee; Attorneys for Appellees.

UTAH SUPREME COURT

BRIEF

IN THE UTAH SUPREME COURT

ALTA INDUSTRIES LTD., a Utah limited partnership, d/ba Steelco, and ALTA INDUSTRIES-UTAH, INC., a Utah corporation, in its capacity as general partner of Alta Industries Ltd.,	
Plaintiffs/Appellees,	
-v-	
LYNN P. HURST and WASATCH STEEL, INC., a Utah corporation,	No. 900612 890902289
Defendants/Appellants.	

BRIEF OF DEFENDANTS/APPELLANTS

L. R. Gardiner, Jr. (1148)
Suzanne K. Cavanaugh (4292)
GARDINER & HINTZE
525 East 100 South, Suite 200
Salt Lake City, Utah 84102
Telephone: (801) 355-7900

Attorneys for Defendants/
Appellants

Bruce A. Maak, Esq.
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147

Attorneys for Plaintiffs/Appellees

IN THE UTAH SUPREME COURT

ALTA INDUSTRIES LTD., a Utah limited partnership, d/ba Steelco, and ALTA INDUSTRIES-UTAH, INC., a Utah corporation, in its capacity as general partner of Alta Industries Ltd., Plaintiffs/Appellees, -v- LYNN P. HURST and WASATCH STEEL, INC., a Utah corporation, Defendants/Appellants.	No. 900612 890902289

BRIEF OF DEFENDANTS/APPELLANTS

L. R. Gardiner, Jr. (1148)
Suzanne K. Cavanaugh (4292)
GARDINER & HINTZE
525 East 100 South, Suite 200
Salt Lake City, Utah 84102
Telephone: (801) 355-7900

Attorneys for Defendants/
Appellants

Bruce A. Maak, Esq.
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147

Attorneys for Plaintiffs/Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and Statutes

Encyclopedias and Treatises

TABLE OF CASES

IN THE UTAH SUPREME COURT

ALTA INDUSTRIES LTD., a Utah limited partnership, dba Steelco, and ALTA INDUSTRIES-UTAH, INC., a Utah corporation, in its capacity as general partner of Alta Industries Ltd., Plaintiffs/Appellees, -v- LYNN P. HURST and WASATCH STEEL, INC., a Utah corporation, Defendants/Appellants.	BRIEF OF DEFENDANTS/APPELLANTS No. 900612 890902289

JURISDICTION

This Court's jurisdiction is based on Article VIII, § 3, Constitution of the State of Utah; Utah Code Ann. § 78-2-2(3)(j) (1987 and Supp. 1990); and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The defendants present for review the following errors:

1. All claims should have been dismissed because they had been released by the plaintiff's Settlement Agreement with its former employee by which plaintiff released claims for the acts upon which their claims are based.

2. The plaintiff's claims for conversion and for fraud and conspiracy should have been dismissed in whole or in part because they were barred by the statute of limitations.

3. The findings of fraud and conspiracy are not supported by

4. The finding of conversion is not supported by the evidence.

5. The damages awarded were improper and excessive because:

a. The damages were improperly calculated on the basis of retail value.

b. The calculation of the damage amount did not distinguish between steel that was acquired by plaintiff's employee by purchase or by gift from the plaintiff and steel for which the employee had not paid the plaintiff.

c. The calculation of the damage amount did not distinguish between the type and value of the steel sold to the defendants.

d. There is no basis for the award of punitive damages.

e. There is no basis for the award of attorneys' fees.

Issues three and four raise questions of fact with respect to which the standard of review is the "clearly erroneous" rule under Rule 52(a), Utah Rules of Civil Procedure; Copper State Leasing Co. v. Black Appliance & Furniture, 770 P.2d 88, 93 (Utah 1988).

The remaining issues present primarily questions of law but to some extent involve mixed questions of law and fact. Conclusions of law will be reviewed for correctness with no "particular deference to the trial court's" view. Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989); Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987). Findings will be overturned under the clearly erroneous rule if they are either without adequate evidentiary foundation or are induced by an erroneous view of the law. Western Capital & Secs., Inc. v.

Knudsvig, 768 P.2d 989, 991 (Utah App.), cert. denied, 779 P.2d 688 (Utah 1989); 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2585 (1971 & Supp. 1991); 5A J. Moore and J. Lucas, Moore's Federal Practice, ¶ 52.03[2] (1991).

DETERMINATIVE STATUTES

The following statutes relevant to this appeal are set forth in Appendix A: Utah Code Ann., §§ 78-12-26(2) and (3) (1987) [statute of limitations] and Utah Code Ann. §§ 15-4-1,3 and 4 (1986) [release of joint obligations].

STATEMENT OF THE CASE

Nature of the case and the proceedings in the trial court

The plaintiff Steelco[1] seeks recovery from Wasatch Steel ("Wasatch") and its general manager Lynn Hurst personally for the sale of basically scrap steel which was sold to Wasatch by the Superintendent over all of Steelco's plant operations. Plaintiff's Superintendent was given some steel and permitted to make some purchases of scrap resulting from cuttings in plaintiff's processing plant which he resold to defendants. There is no question that he paid his employer for the initial cuttings which he resold. There is also no question that later the Superintendent was directed to dispose of large, bulk items of fabricated steel left in an outside storage lot and that the Superintendent was

---

[1]"Steelco," according to the caption in this case, is a name under which Alta Industries Ltd., a limited partnership, does business. Alta Industries Ltd.'s general partner, Alta Industries Inc., is only a nominal party.

authorized to sell some of this more-or-less junk steel for his own account. The case centers on the fact that the Superintendent continued to sell (but did not pay his employer for) what ultimately aggregated to a fairly substantial amount of the scrap cuttings over the course of a four-year period, not only to the defendants here, but to several other companies also, and that he also kept part of the proceeds from the sale of the larger junk fabricated items. Steelco claims that the defendant Lynn Hurst personally and the company for which he worked and was a part owner, the defendant Wasatch Steel, knew that the Superintendent had stolen this surplus steel and conspired with him. Defendants deny knowledge of the Superintendent's wrongdoing and assumed that he had authority to dispose of the surplus pieces.

The complaint was filed April 11, 1989. Trial started September 25, 1990. The case was tried to the court without a jury, the Honorable Leonard H. Russon presiding. Plaintiff based its case on four theories: conversion; fraud and conspiracy; violation of the Utah racketeering statute; and receiving stolen property. A memorandum decision was issued on October 21, 1990. Thereafter the court adopted verbatim and without change findings of fact and conclusions of law submitted by plaintiff. The court rejected plaintiff's theories of racketeering and receiving stolen property, found defendants liable on the conversion and fraud and conspiracy counts, rejected defendants' release and statute of limitations defenses, and awarded general damages of $120,417.15 (based on a conversion theory of damages), $100,000 in punitive

damages, and $35,850 in attorneys' fees, for a total of $256,267.15, plus interest and costs.

Defendants seek relief from a judgment based on inadequate evidence and the application of an erroneous measure of damages and which should have been rejected to begin with because it is based on claims barred by the statute of limitations and by a written release given to the plaintiff's Superintendent.

Statement of Facts

Plaintiff Steelco and defendant Wasatch Steel, while both are described as "steel companies," are in different types of business. They are not competitors. Steelco handles big sales to major customers; Wasatch deals basically, though not exclusively, in small sales to walk-in trade. Steelco deals primarily in large orders of new steel; Wasatch deals primarily, though not solely, in smaller items of both used and new steel, generally, but not solely, of the type which Steelco chooses not to deal in and would treat as scrap. (R. 450 at 7-8, 149-151.)

Steelco does not sell little stuff; it deals primarily in large stock sheets and bar and angle steel. It buys in large, truck-load quantities from major steel mills. The quantities of sheet and bar and angle are stored and then cut and fabricated in its plant to meet customer requirements. "Angles" and "bars" of steel purchased and stocked by Steelco are 20 feet long. Steel sheets are purchased as 4 or 6 feet in width, normally in 10, 20 or 30 feet lengths. (R. 450 at 119.) When Steelco cuts and fabricates stock sizes to a customer's order, pieces are left over. "Ton after ton" of these leftover pieces, or "cuttings," are

developed each month. (R. 450 at 157.) Anything left over from the large stock size of sheet or plate steel less than six inches in width, regardless of its length, is considered by Steelco to be "scrap" and is thrown into a "scrap tub." When dealing with beams, angles, or channels, anything less than five feet in length is considered scrap and goes into the scrap tub.[2] Anything larger is put back in inventory, "hopefully" to be used on some other project. Steelco calls this "remnant." (R. 450 at 119, 153-154.) Scrap is sold for "a minimum amount of money" to a scrap dealer. Between 1983 and 1987 the scrap price was generally 1¢ or 2¢ a pound. Occasionally it got a little higher, maybe up to 3¢ a pound. (R. 451 at 87.) "Very rarely" did Steelco sell remnant, but it was "hopefully" used in filling customers' orders where larger sizes salvaged from a prior project could be used. (R. 451 at 119-120.) Defendants, on the other hand, do not consider these terms to be so precisely defined in the industry, and "scraps, remnants, drops, shearings, leftovers [all] imply mostly the same definition." (R. 450 at 40.) This is important because Steelco may contend that reference to "remnant" in questions put by plaintiff's counsel are according to his definition, but it must be remembered that Mr. Hurst answered according to his own definition.

Steelco generally purchased stock sizes of steel for 16¢ to 18¢ per pound and sold it at a 25% markup in the "low 20" cents per pound range. (R. 450 at 120.) Remnant, when it could be used

---

[2]However, even this definition is inexact because Plaintiff explained that it would not be economical for Steelco to try and use even a 10-foot piece of angle iron. (R. 450 at 155-156.)

in filling a subsequent order, was sold for this same higher price. This is regardless of the fact that a prior customer has previously paid the full 20¢ or 25¢ price for that remnant (or the full price of scrap eventually sold to scrap dealers). For example, if a customer ordered 100 pieces of angle iron but did not want the pieces the full 20-foot stock length but wanted them only 18 feet in length, the customer is charged the full price for the full 20-foot stock length. The customer is entitled to the 2 feet cut off because he has paid for it (plus a cutting charge), but if he does not want it, the pieces left behind are placed in the scrap tub or replaced in inventory for "remnant," depending on the size of the remaining piece. In the example given, because the pieces left over are less than 5 feet, they are thrown into the scrap tub. If the customer in this example had had the pieces cut to a dimension (say 14 feet) that would leave remaining a piece longer than 5 feet, that remaining piece would go back in inventory as remnant, but the customer would still pay the full price for the full 20-foot stock length. If the 6-foot piece placed back in remnant could be resold, it would be sold for the full price. The same would apply also to sheet steel. Thus, all scrap and all "remnant" are, in effect, sold twice by Steelco. (R. 450 at 153-160, 165-167.)

This whole controversy centers around activities of Volma Heaton, plaintiff's Superintendent. He was plaintiff's chief witness at trial. He was General Superintendent over all of Steelco's production facilities. To use the description of plaintiff's counsel, he "was in charge of overseeing the activities

of the steel storage, steel fabrication and steel sales out in the working part of the business." (R. 450 at 6.) He was responsible for the "overall operation of the plant," including all of the steel inventory both inside and outside the plant, all of the processing and fabricating operations, and the loading and transportation department. (R. 450 at 195.) He was in charge of the pieces of steel left over in these processes. (R. 451 at 66.)

Steelco is a large operation, and Volma Heaton was an important man in the organization. Plaintiff's plant operated on at least two full shifts a day. (R. 451 at 102.) There were only two or three people above Heaton in this entire company. The only two higher executives are Leon Hansen, the general manager of the steel division during the entire pertinent time period (1983-1987), and Robert Elkington, a certified public accountant formerly with Touche, Ross & Co., who is president of the entire company. (R. 450 at 116, R. 452 at 119-121.) During the early part of this time period, Darrell Milzarek was plant manager, but he left in 1984 or 1985. (R. 451 at 66-67.) He was "the plant manager with Volma" Heaton. (R. 450 at 152.) Plaintiff called Mr. Hansen and Mr. Elkington to testify at the trial but did not call Mr. Milzarek. Volma Heaton, as the Superintendent, was in charge of the processing plant and reported directly to Hansen. While Mr. Milzarek was there, Heaton also reported to him. (Id.)

Although Mr. Hansen, the general manager of the steel division, has his office with the company's general offices almost a block away from the processing plant, he is at the processing plant "continually, four, five, six, seven times a day." (R. 450

at 148-149.) This is the plant where Volma Heaton, as the Superintendent, had his office. Mr. Milzarek's office also was at the plant. Heaton was considered a "very satisfactory" superintendent who "absolutely" worked overtime and "absolutely" worked Saturdays as well. (R. 450 at 160.)

Employees were permitted to buy both scrap and remnant. (R. 450 at 162.) The company had a policy that employees could take something out of the scrap pile (so long as it was not the "whole tub") and it would be given to them without charge, but they would be required to pay for any remnant that they took out of inventory. (R. 450 at 165.) There seems also to have been a policy that although scrap was frequently given to employees, they also were sometimes required to pay a cent or two a pound for it. This policy contemplated that materials taken or purchased would be used for the employee's own purposes. Volma Heaton, the Superintendent, was in charge of the scrap pile and some employees went to him for purchases. (R. 450 at 164, 196.) New steel was sold to employees at a discount of about 5%, remnant (as plaintiff defined it) was sold at a discount of around 75%, and scrap was sold to the employees for "around a cent and a half per pound." (R. 451 at 69-70.) Heaton made many purchases of scrap himself for his own use. (R. 450 at 197.)

Steelco and Wasatch were not strangers. Wasatch usually dealt in small quantities and handled little customers, whereas Steelco did not wish to handle small customers. Steelco often directed customers to Wasatch. (R. 450 at 151.) There were transactions between the two companies, and Steelco purchased steel on occasion

from Wasatch. (R. 451 at 151.) Even before the matters here involved, each company had an account with the other. (R. 451 at 19.)

It was not surprising, therefore, when the plaintiff's Superintendent came to Wasatch in 1983 and inquired if Wasatch was interested in buying scrap steel. (He knew as a matter of common knowledge in the industry that Wasatch bought and sold these small pieces of new steel.) He was told that would depend on the type of material--to bring it over so Mr. Hurst could see it. (R. 451 at 74-75; R. 454 at 72.) He took some over in his pickup truck. (R. 451 at 84.) He told Hurst that he was authorized to buy this scrap steel from Steelco and resell it. (R. 451 at 75-76, 79-81; R. 454 at 72.) Heaton also sold steel to Allstar Manufacturing, implying that he owned the steel he was selling. (R. 451 at 33.)

At the time Heaton started this process of buying from his employer and reselling, his purchases were in fact authorized by Milzarek. (R. 451 at 91.) Mr. Hansen also had authorized a number of these purchases by his Superintendent. (R. 450 at 182-183.) This even included quantities beyond the amount where he started "worrying about [employees] reselling" rather than just buying for their own use. (R. 450 at 181.) Some purchases by Heaton could be identified from plaintiff's records, but certainly not all of them. These particular purchases by Heaton which could be identified and which were authorized by Hansen, including those of more than just nominal value which would cause concern about reselling, occurred as late as 1986, as shown by dates on invoices that plaintiff did still have. (Ex. 16-P; R. 450 at 178-184.)

Mr. Hansen concedes that he never questioned Heaton and Heaton could do "almost . . . what he wanted . . . with the material." (R. 450 at 184.) Heaton believed he had been authorized to buy some of this steel and resell it. (R. 451 at 75, 85-86, 91.) When he started selling these small loads to Wasatch he paid for them. (R. 451 at 72-73, 86, 94.) There were cash payments made by Mr. Heaton to Mr. Milzarek or to Patty Midgley, the person in charge of sales in the plant office, for which there is no account in plaintiff's own records. (R. 450 at 180-181; R. 451 at 100; R. 452 at 101.) On some occasions Heaton was not even given a receipt for his money. (R. 451 at 91-93.) There is no record of what happened to that money given to Mr. Milzarek or Ms. Midgley. Even after he stopped paying, Heaton at first nevertheless intended to pay at some time. He did not communicate to defendants or anyone else his secret change in intention. (R. 451 at 96.) Even later, in 1986 and 1987, he paid for some purchases as shown by plaintiff's own records. (R. 451 at 96-100, 178-184.)

In this period, Steelco moved its operation to a new location formerly owned by another steel company. What is called the "South Yard," a large piece of open property, was cluttered with nearly every conceivable kind of steel. (R. 450 at 132-133, 169; R. 452 at 121-122.) Some of this clutter was in form as originally obtained by the previous owner from steel mills, apparently as a result of overbuying on various projects (but though once new, this was now rusted as a result of its storage outdoors). The rest of

it was various fabricated pieces and items of equipment that were discarded by the prior owner. (R. 451 at 10-11, 109-110.) Eventually Steelco management desired to have the South Yard cleaned up and the useable material processed. At that time, Volma Heaton, the Superintendent, had a conversation with his supervisor, Mr. Hansen, the steel division manager, in which Heaton was authorized to remove some of this material in the South Yard for himself without paying for it. This was scrap material such as beams that had welds on them or angles and different items that Heaton had to cut apart to move out of there. He cut up and removed a large quantity of this and sold it to Wasatch Metals. (Wasatch Metals is a company entirely separate from Wasatch Steel, owned and operated by different people, but located next door to Wasatch Steel. (R. 450 at 60; R. 451 at 14.) However, some of the beams were stacked up in the cleanup process. These beams were not in condition to be sold as new material because they had welds on them or holes punched in them, and Hansen directed Heaton to dispose of them. He contacted Lynn Hurst at Wasatch Steel and arranged for the sale of all of this to Wasatch. (R. 451 at 16-18.)

After Heaton had contacted Mr. Hurst, Hurst came over to Steelco to look at the material and gave a bid on a large quantity. (R. 450 at 67.) Mr. Hansen told Heaton to "go ahead and sell them." (R. 451 at 17.) Although Heaton understood he was to sell this on behalf of Steelco, he told Hurst that he owned part of the steel and he directed Hurst to pay Heaton personally for some of it. (R. 450 at 67; R. 451 at 17-20, 114.) Mr. Hurst followed the

directions of Steelco's Superintendent and did make some payments to Steelco and some to Mr. Heaton as directed by the Superintendent.

Mr. Hansen estimated that there were 40 tons of this equipment and unusable items in the South Yard and "10, 15 times as much" more usable material. (R. 451 at 11.) On several occasions Wasatch sent its truck over to get material sold to it. On other occasions Steelco trucks delivered it to Wasatch. Obviously, there were many, many loads. They were not paid for at time of delivery, but after groups of say "three, four, five loads" plaintiff's Superintendent, Heaton, would direct Mr. Hurst which loads were to be paid to Steelco and which loads were to be paid to him. (R. 451 at 114-115.) Heaton claims that he told Hurst on several occasions that Steelco must not know about these payments. (R. 451 at 7-8.) Cleanup of the South Yard took place in 1986 and was completed in December 1986. (R. 452 at 121-122.)

New scrap steel sold between 1983 and 1987 to Wasatch was usually handled in a pickup truck. Sometimes it was Heaton's personal pickup. Other times delivery was made to Wasatch in a Steelco truck. (R. 451 at 114.) Midway in this period Heaton had a company pickup so the delivery was made in his Steelco pickup. (R. 451 at 2.) On occasion Heaton would have Mr. Hurst come over to Steelco and look at cuttings which he told Hurst were going to scrap to see if Wasatch was interested in buying them. (R. 450 at 67.) Mr. Hurst was at plaintiff's plant to look at steel that Heaton proposed to sell him about ten or fifteen different times. On one occasion he examined material even inside the plant. On

that occasion the bid he gave was not accepted and presumably Heaton disposed of the material elsewhere. (R. 454 at 98-99.)

The first shift at Steelco ended and a second shift started in the processing and loading departments at 3:30 p.m.. (R. 451 at 101-102.) So, from 6:30 a.m. to 10:30 p.m. there were a sizable work force and supervisors at the plant. Heaton usually loaded the materials himself, but occasionally an employee helped him. (R. 451 at 101.) Often he used cranes or other equipment to load it. Mr. Milzarek saw him loading steel on some occasions, but he never questioned Heaton because Heaton told him he was buying it. (R. 451 at 103.) Particularly "at the beginning" (1983 and 1984), Heaton is certain that Milzarek saw him loading steel. (R. 451 at 102-107.) The loading was usually done after Heaton's regular shift ended at 3:30 p.m. (or on a Saturday), but he had to have the material over to Wasatch before 5:00 p.m. because Wasatch closed at that time. (R. 451 at 104.) Sometimes Heaton filled out a "ticket" for the loads; other times he did not. Tickets were filled out by him at least in 1984 and 1986 as shown by the tickets in evidence. (R. 451 at 107.)

During this period the Superintendent, Heaton, was also selling Steelco material to at least three other companies as well --Davis Supply, Mr. Trailer, and Allstar Manufacturing. (R. 451 at 32-37; R. 452 at 147, 207; R. 453 at 4-5.) Heaton was even selling fabricated material to these companies. In the case of Allstar this involved fabrication of parts for stoves. (R. 451 at 32-34.) In other words, Heaton was also using Steelco's facility to manufacture items that he sold to others.

A precise record was kept by Wasatch on every purchase and payment made. Most payments were by check. Check records and receipts have been kept. A receipt was given on both cash payments and checks to Heaton. (R. 450 at 42-49.)

One of Steelco's customers, Equitech, manufactures tractors used at airports for pulling large jet aircraft from passenger loading terminals. Heavy steel plate is placed in these tractors as "ballast" to add additional weight, thereby increasing traction. Equitech had been a large customer for several years, and Steelco was forming a lot of the tractor chassis and making different parts as well as supplying the steel plate used for added weight. (R. 450 at 139-140.) It takes 20 tons of this steel plate used for ballast in each tractor. It is covered up in the tractor and is not seen from the outside. For this use Steelco regularly purchased from various mills a low grade of plate called "cobble steel." This was, in effect, defective steel produced with a "cobbled" appearance on its surface. (R. 452 at 47, 106, 115; R. 454 at 106.)

In 1986 Steelco needed additional steel plate for this ballast. As plaintiff's chief witness in this case, Heaton, explained, Steelco needed more of this "heavy plate . . . that could be burned in smaller pieces" for this customer. (R. 451 at 22.) He contacted Lynn Hurst at Wasatch, told him Steelco needed this plate, and asked for a price. Mr. Hansen, Heaton's boss, also explained that Heaton advised the purchasing department that he had located some material for use as ballast and requested a purchase order. (R. 450 at 138, 186.) When asked for a price, Hurst gave

a price, but Heaton asked that he be paid a commission for generating this business for Wasatch. (R. 451 at 22.) Hurst's opinion of Heaton "dropped" when asked for this commission and he felt this was "sleazy." (R. 450 at 81, 89.) He did pay the commission, however. (R. 450 at 77.) The commissions were paid by check and were fully recorded in Wasatch's records. (R. 450 at 77, 90-91.) There was no effort to conceal them. Four commission checks were paid on March 8, March 27 and May 12, 1986, and August 8, 1987. (Exs. 13-P and 28-P.) They amounted to a total of $2,363.44. There were other transactions with Heaton not so clearly identified in Wastach's records, and plaintiff contends they were also commissions. They total $1,728.76. Plaintiff referred to these throughout the trial as "kickbacks." Even at a price set by Wasatch at a level to cover the "commission" demanded by Steelco's Superintendent, the price paid by Steelco, particularly after considering that this was a delivered price and other sources required payment of additional freight from the mill, was lower than the price charged by the mills for cobble steel. (R. 452 at 65-66.)

Four or five tractors a month were put out. Cobble steel purchased from the mills exceeded in total tons by a "tremendous" amount the small quantity sold by Wasatch. (R. 450 at 189-190.) A number of people at Steelco, including notably Mr. Hansen, the general manager of the steel division, knew of the purchase of this ballast steel from Wasatch. (R. 450 at 142.) Some Steelco employees even expressed dissatisfaction with the quality of the

stuff, even though it was used solely as ballast inside the tractor where it could not be seen. (R. 452 at 115.)

Another former employee of Steelco, Ms. Chris Williams, surfaced in the course of this case and claimed to have been paid $6,000 in "commissions" or "kickbacks" by Wasatch. She was a dope addict who was taking cocaine every thirty minutes during the course of her employment at Steelco. (R. 451 at 145, 162-163.) She also was taking other "mind altering" drugs. (R. 451 at 163.) She worked in the plaintiff's administrative offices where Mr. Hansen and the company president, Elkington, had their offices. (See, R. 450 at 147-149.) Hansen was unaware of this drug use. (R. 453 at 35.) Elkington did not find out about her drug use until after she was fired for stealing cash. (R. 453 at 35.)

In 1987 a cash shortage was discovered and the company required lie detector tests of suspected employees. (R. 452 at 123.) Ms. Williams lied on her first test and still passed it. (R. 453 at 32.) She failed subsequent tests, however, and then admitted stealing about $1,000. She was then fired. (R. 452 at 122-123.) Another of plaintiff's witnesses, Patty Midgley, the employee in the plant office at Steelco who prepared orders, invoices, and took cash payments, knew of Ms. Williams' addiction but said nothing until after the series of lie detector tests. (R. 451 at 166.) Ms. Williams said there were at least five other employees (who are named by her) employed at Steelco who knew she was using illegal drugs. (R. 451 at 166-168.)

Nevertheless, Ms. Williams was called by plaintiff to testify. She claimed to have been paid $6,000 in cash payments on purchases

of this ballast steel which she claimed she arranged herself with Lynn Hurst after Volma Heaton told her about the commissions he was getting. She had no supporting evidence. She produced no deposit slips or other written record. There is no check or any other evidence of such payments in Wasatch's records. She claimed she could remember the total of $6,000 because she kept a record in her journal, but she destroyed the journal two days before trial. (R. 451 at 160-161.) She claims to have been paid $6,000 in commissions on purchases by Steelco of $13,586.45 worth of steel. (Ex. 25-P; R. 151 at 191.) If so, more than half the sales price was commissions, for Heaton testified that he asked for and received commissions on the very same invoices. (See, Appendix C.) The commissions paid to Heaton were calculated in precise cents per pound and totaled about twenty-five percent of the price paid by Steelco.

Defendants candidly admitted paying commissions to Heaton. Wasatch kept a record of those payments and although displeased at being forced to pay a "commission," it did not hide it. They do deny, however, paying any money to Williams, and there is absolutely no evidence in Wasatch's records or any place else of any payment to her.

Chris Williams and the Superintendent, Volma Heaton, had a "close relationship." She saw him every day at work, they went to lunch once or twice a week, went to dinner sometimes, and went to bars together. (R. 451 at 167-168.) Williams worked in the office, while Heaton was "down in the shop." She sent the orders she had typed "down to him," and that is how she got to know him.

She helped Heaton on eight or twelve occasions on Saturday mornings remove steel from the South Yard. Heaton told her "that he had made an agreement" with Hansen, the general manager, to remove the steel from the yard, "that he was going to pay them a cent and a half for that," and that she could make some money if she helped him on weekends. Sometimes she drove the company forklift to load the steel into Heaton's pickup; other times she drove around the yard and helped "get the good stuff." (R. 451 at 147-150.)

Lynn Hurst denies ever knowing this lady, let alone paying her any commission. (R. 450 at 108.) He did not have cash of this sort personally to pay her, and Wasatch did not have that kind of cash lying around. All deposits made by Wasatch at its bank show that there was no "cash back" given on any deposit, and it was against bank policy to permit cash to be given back from a deposit made by a business entity. (R. 454 at 46.)

Heaton and Williams claim, however, that Williams occasionally accompanied Heaton to Wasatch where they claim she was introduced to Lynn Hurst. To support its claim that Mr. Hurst knew Chris Williams, plaintiff included as part of Patty Midgley's testimony the claim that she and Chris Williams saw Hurst at a theater and that he said hello "generally" to the two of them (R. 452 at 29); but on prodding of plaintiff's counsel and over objection of defense counsel, she said this greeting was directed more to Williams than to her. (R. 452 at 29-30.) This is the same Patty Midgley who worked in the office at the plant and received some of Heaton's cash payments. (See, R. 452 at 23.) She had also been Williams' roommate. (R. 452 at 24.) She, of course, knew Lynn

Hurst because he was at Steelco on several occasions. (R. 452 at 25-26.)

Mr. Hansen and Mr. Elkington claim that they first learned of wrongdoing in their company in November 1987, when thefts from cash receipts in the shop came to Elkington's attention. After lie detector tests were administered, employees started reporting on Volma Heaton's activities. In November 1987, an employee told Elkington that "she had heard" that Heaton was involved in "corrupt practices going on in the shop." She revealed Patty Midgley as her source. Midgley had not advised her employer of these "corrupt practices" or of drug use on the job by company employees. But when confronted by the president, she reported that she thought Heaton was stealing steel and not paying for it, though she denied ever seeing him do that. (R. 452 at 125.) Elkington then had Hansen interview all employees who worked directly with Heaton.

Following these interviews, on a Saturday morning, December 5, 1987, Elkington received a call in his office (he was working Saturday) from an employee in the shop on that Saturday who reported seeing Volma Heaton, his Superintendent, take a load of steel out of the yard without paying for it. The employee thought Heaton was headed for Allstar because he took steel plate that had been sheared for stove parts. (Allstar makes stoves and buys cut or fabricated steel plate from Steelco. R. 452 at 126.) Elkington went to Allstar but he did not see Heaton there. Allstar later confirmed that thousands of dollars worth of stove parts had been purchased from Heaton and payment had been made directly to him and not Steelco. By interrogation of Heaton, it was learned that scrap

plate had been sold to other companies, including Wasatch. (R. 452 at 129.) Elkington at that time only "suspended" his Superintendent. (Id.)

One day Heaton came into the office of Wasatch Steel and in the course of casual conversation with Lynn Hurst mentioned that Hurst might be contacted by someone from Alta Industries wanting information about Heaton's transactions with Wasatch. When asked why, Heaton said he was being investigated because he had quit paying for some of the material he had sold to Wasatch. He also asked Hurst, if he was contacted, to withhold the information on those transactions. Mr. Hurst told Heaton he did not want to be involved in any attempt to withhold information. (R. 454 at 89.) Hurst contacted his company's legal counsel, who advised that it would be wise to get Heaton's permission before supplying records of Heaton's transactions. (R. 454 at 91.)

On December 26, 1987, Elkington called Hurst and explained that he was investigating transactions of his Superintendent, Heaton, and wanted to look at records of Heaton's sales to Wasatch. As instructed by his lawyer, Hurst explained that if Heaton would supply a letter authorizing the release of information, he would be happy to supply it. (R. 454 at 89-91, R. 452 at 130.)

Sometime in this time frame Volma Heaton was formally fired. He then gave to Elkington an undated letter (Ex. 20-P) in which he recited that he had spent an afternoon at Wasatch going over all the receipts and that Wasatch had paid him $9,185.85. He stated that he knew that he had "paid Steelco for some of this, but he had no records to show how much" and asked in that letter that that

amount "be added to" the amounts Elkington had already calculated. He said in his note that Elkington should call Lynn Hurst if he wished to verify this amount. (R. 452 at 131.)

Here it is noted that, contrary to assertions made in testimony at trial (R. 451 at 63-64), there had been assurances that court action would not be taken against Heaton. Heaton said in this note, "I appreciate your commitment to keep this on a personal basis and out of the courts. I appreciate your promise to handle it this way." (Ex. 20-P.)

On December 31, 1987, Volma Heaton went to Wasatch's office. He was there because Elkington told him to give Lynn Hurst a letter because Hurst would not release anything without Heaton's authorization. Heaton was nervous and wrote out a letter (Ex. 48-D) authorizing release of information for 1986 and 1987 and then left. (R. 454 at 92.)

That very day, late in the afternoon, New Year's Eve, 1987, Elkington went to Wasatch Steel. This was the first and only time that he ever met with Hurst or anyone from Wasatch. He asked to get right into the documents showing purchases of steel by Wasatch from Steelco, and they were given to him. Mr. Hurst did explain, however, that he was upset by all of this and that he had been dealing with Heaton in good faith on Heaton's explanation that he had an agreement to buy materials from his company. Mr. Hurst testified that Elkington confirmed that that was the case and that Heaton did have an agreement to purchase the steel but that some point he quit paying for it. Elkington also explained to Hurst that this was simply a collection proceeding with Heaton and that

he (Elkington) was simply trying to determine to what extent. He said he had no claim against Wasatch. (R. 454 at 93-94.) On redirect examination, Elkington denied saying that Heaton had an agreement to purchase the steel, but he did not deny the rest of this conversation as testified to by Mr. Hurst. (R. 454 at 167.)

Elkington was given all records that Heaton had authorized. He freely examined them. His detailed notes even include the notation, as shown on Wasatch's own record, that one of these payments was for a "commission." (Ex. 14-P.) Elkington asked if there were records for prior years and was told yes but that Heaton's letter just authorized 1986 and 1987. Elkington called Heaton and asked for authorization to examine records for 1985. He then wrote on the bottom of Heaton's written authorization: "In telephone conversation @ 4:00 p.m. 12/31/97 Volma consented to release of 1985 information." (Ex. 48-D.) Wasatch had recently moved to new offices, and the files were not in the best order. It was also late in the day on New Year's Eve, but Mr. Hurst went to the storeroom, unearthed the 1985 records, and he and Elkington reviewed them. (R. 454 at 96.)

After reviewing the 1985 records, Elkington asked if there were earlier records. He was told that Hurst believed there were but that he was not sure when Heaton had started sales. Elkington asked to look at those records, but the recent move and the disorder of the storage room were explained and also that that time, on New Year's Eve (it was now after five o'clock), he could not produce them and, more importantly, that Heaton had not given a release to provide the documents pertaining to the earlier

transactions with him. There was no refusal to produce anything; it was simply a matter of the absence of further release from Heaton and the inconvenience of that occasion. (R. 454 at 97.) Anything Elkington had asked for had been given to him, and anything further he would have asked for, with Heaton's release, would have been given to him. (R. 454 at 98.)

Mr. Elkington did not say he would come back or get authorization from Heaton or anything. He left. He never came back. Mr. Hurst never saw him again until after this law suit was started in 1989. (R. 454 at 98.)

In March 1988 Heaton and Alta Industries "dba Steelco" signed an elaborate Settlement Agreement. (Ex. 22-P.) The agreement recites that Heaton had "engaged in various wrongful and unlawful acts, including, without limitation, the unauthorized sale of steel products of the company to other persons for his own account" and that the company had recently discovered "some of such acts" and there had been "sufficient knowledge and evidence to bring a law suit or other action" against Heaton. The Settlement Agreement, in an exhibit, recited only sales to Allstar and Wasatch. No mention is made of other companies to which sales had been made by Heaton. The precise dollar volume of sales to Wasatch for 1987, 1986 and 1985 is recited. The Settlement Agreement has attached as an exhibit the very sheets, in Elkington's handwriting, that he made on New Year's Eve at Wasatch listing the amounts for these years. For 1983 and 1984 there is simply a question mark after each year and no amount is recited, but there is a $5,000 estimate for these years.

The Settlement Agreement required payment by Heaton of $32,939.11 cash, plus a forgiveness of debt by Alta "in lieu of . . all employment related obligations" of $10,000, for a total consideration of $42,939.11. (Ex. B to Ex. 22-P; R. 451 at 141-142.) Heaton paid $30,329.11 cash. (R. 451 at 142.) The agreement also included a Confession of Judgment for $42,939.11 and gave a general release to Alta. In return, Heaton received a covenant that the company would not "initiate or join in a law suit or any other action against Heaton in connection with the wrongful and unlawful transactions." No action, civil or criminal, has ever been taken against Heaton.

The complaint was filed over a year later, in April 1989. Four months later, on August 16, 1989, after the Settlement Agreement surfaced in discovery, Heaton signed a document entitled "Rescission of Settlement Agreement" (Exhibit 24-P) attempting to rescind the Settlement Agreement on the ground that the schedule of wrongs attached to the Settlement Agreement was not true.

This statement of facts is more extensive than customary in order to marshall in the statement evidence arguably in support of the decision.

ARGUMENT

Summary of Arguments

In a "Memorandum Decision," the trial court found the defendants liable on theories of fraud and conspiracy as well as conversion. That decision and the "findings" in it are inadequate and contrary to law. The written decision does not mention the statute of limitations, nor does it consider the effect of the

release given to Heaton. The decision begins with a statement that "The Court finds by the preponderance of the evidence the following facts." (R. 273.) Of course, fraud and conspiracy must be found by clear and convincing evidence. Plaintiff's counsel attempted to correct these errors in the findings he prepared. However, even those findings can not overcome the inadequacy of the evidence which was contradictory and suspect and is far from "clear and convincing." More fundamentally, it remains that the claims were released by the prior discharge of Heaton and are further barred by the statute of limitations.

The court also erred in applying the wrong measure of damages, in awarding punitive damages, and in awarding attorney fees absent a statutory or contractual fee provision.

I

The Claims are Barred by a Previous Release and by the Statute of Limitations

Two legal issues are met at the threshold. As a consequence of a release granted to Volma Heaton a year before suit was started, any claims against the defendants were also released as a matter of law. Substantial parts of the claims are also barred by the statute of limitations. Thus, the chronology of significant events is important. This chronology is shown in Appendix B.

A. All Claims Were Released By the Release Given to Heaton

More than a year before the complaint was filed the plaintiff released Volma Heaton, the principal actor in the alleged joint acts of conversion and fraud, without any reservation of rights against others. This written agreement released all other alleged

joint actors by virtue of the Utah Joint Obligations Act, Utah Code Ann., § 15-4-4 (1953). For purposes of the Act, an "obligor" includes a person liable for tort and an "obligee" includes a person having a right based on tort. § 15-4-1.

Under this statute a release of one joint obligor without express reservation of rights against other joint obligors or joint tortfeasors releases the others. E.g., Holmstead v. Abbott G. M. Diesel, Inc. 493 P.2d 625 (Utah 1972) overruled on other grounds Krukiewicz v. Draper 725 P.2d 1349 (Utah 1986); Jorgensen v. Aetna Cas. & Sur. Co., 769 P.2d 809, 813 (Utah 1988); Western Steel Co. v. Travel Batcher Corp., 663 P.2d 82 (Utah 1983); Sims v. Western Steel Co., 551 F.2d 811, 818 (10th Cir. 1977); Matland v. United States, 285 F.2d 752 (3d Cir. 1961); Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935); Melo v. National Fuse & Powder Co., 267 F.Supp. 611, 613 (D. Colo. 1967). Although the Settlement Agreement (Ex. 22-P) exacted from Heaton a full release, the plaintiff gave Heaton only an "agreement not to sue." The difference in wording is of no significance. It had the practical effect of releasing or discharging Heaton. However denominated, an instrument discharging one joint tortfeasor that contains no reservation of rights still operates to discharge all joint tortfeasors. Holmstead v. Abbott, supra; Sagan v. State, 205 Misc. 435, 128 N.Y.S.2d 924 (Ct. Cl. 1954); United States v. First Sec. Bank of Utah, 208 F.2d 424, 428 (10th Cir. 1953); Bergeson v. Life Ins. Corp. of America, 170 F.Supp. 150 (D. Utah 1958).

It is recognized, of course, that this Court in the Krukiewicz case, supra, (725 P.2d at 1350) stated that the 1973 enactment of

§ 78-27-42 as part of the Utah Comparative Negligence Act effected a pro tanto repeal of § 15-4-4. The Uniform Joint Obligations Act was enacted by the Utah Legislature in 1953. It has never been expressly repealed either in part or in whole. The Krukiewicz decision assumed an implied repeal by the Comparative Negligence Act, but that decision does not require such broad application of § 78-27-42.[3]

Repeal by implication is not favored

"It is elementary that the repeal or over-riding of an existing law by implication is not favored and only occurs if the later statute is wholly irreconcilable with the former." Moss v. Board of Com'rs of Salt Lake City, 1 Utah 2d 60, 261 P.2d 961, 964 (1953); see also, State v. Sorensen, 617 P.2d 333, 335 (Utah 1980). Implied repeal can be found only when the statutes "cannot, by any reasonable interpretation, be reconciled so as to be enforceable as a harmonious whole." Salt Lake City v. Towne House Athletic Club, 18 Utah 2d 417, 424 P.2d 442, 444 (1967).

It must be assumed that the legislature "has in mind previous statutes relating to the same subject matter" and that, in the absence of any express repeal, "the new provision was enacted in

---

[3]The Krukiewicz case, while appropriately addressing the point on the limited facts there involved, involved only a narrow factual issue of employer liability in a negligence action. That decision was directed to the specific issue of whether an employer was to be considered as a joint tort-feasor with his employee. The case was centered on interpretation of the Comparative Negligence Act and application of common law principles pertaining to the employer-employee relationship. It need not be so broadly read as to hold that § 15-4-4 no longer has any applicability.

accord with the legislative policy embodied in those prior statutes, and they all should be construed together." Murray City v. Hall, 663 P.2d 1314, 1318 (Utah 1983). Even statutes that are "in apparent conflict, are so far as reasonably possible construed to be in harmony with each other." Id. at 1318. "Proper statutory construction requires that the statutes be harmonized wherever possible, and also that significance be accorded every part of the statute." Glenn v. Ferrell, 5 Utah 2d 439, 304 P.2d 380, 383 (1956); Ellis v. Utah State Retirement Board, 757 P.2d 882, 884 (Utah App. 1988) aff'd, 783 P.2d 540 (Utah 1989). "[W]here there are two or more statutes dealing with the same subject matter they will be construed so as to maintain the integrity of both." State v. Judd, 27 Utah 2d 79, 493 P.2d 604, 606 (1972); Sorensen, 617 P.2d at 335; see also, Moss, 261 P.2d at 964.

The Joint Obligations Act
has not been totally repealed

Section § 15-4-4 of the Joint Obligations Act and § 78-27-42 which is part of the Liability Reform Act are reconcilable statutes that can stand separately.

Utah's Comparative Negligence Act, adopted in 1973, replaced the common law doctrine of contributory negligence with the doctrine of comparative negligence. The act retained the concept of joint and several liability but also created a new cause of action whereby a joint tortfeasor who had paid a plaintiff more than the pro rata share of an award could seek contribution.

The Liability Reform Act was adopted in 1986. While retaining the doctrine of comparative negligence, the Reform Act eliminated

joint and several liability and replaced it with several liability. Utah Code Ann. § 78-27-38. Because tortfeasors in negligence actions that accrue after the effective date of the Liability Reform Act[4] can only be found severally liable, the Joint Obligations Act no longer applies to them. The two laws stand separately.

Even under the law as it existed before the effective date of the Liability Reform Act, the Joint Obligations Act had some application. For example, when a joint obligation arose from the defendant's intentional conduct, the Comparative Negligence Act generally had no application, and the Joint Obligations Act governed. As the Kansas Supreme Court explained:

---

[4]The Liability Reform Act may not be applied to injuries occurring prior to its effective date, April 28, 1986. Stephens v. Henderson, 741 P.2d 952, 954 (Utah 1987). One author has commented:

> [T]he Liability Reform Act should apply to causes of action accruing after April 28, 1986, while causes of action accruing prior to this date should be governed by the entirety of the Comparative Negligence Act. Therefore, if a cause of action accrued prior to the Acts' effective date . . . the defendants involved would be entitled to seek contribution from fellow tort-feasors after paying more than their pro rata share of the plaintiff's damages. If an action accrues after the Liability Reform Act's effective date . . . defendants involved . . . would be subject to several liability exclusively, and thus their need for contribution would be nonexistent.

Note, The Liability Reform Act: An Approach to Equitable Application, 13 J. Contemporary Law 89, 117 (1987).

In this case, some of the alleged acts of conversion or fraud occurred prior to the effective date of the Liability Reform Act; others occurred after. However, as discussed below, the distinction is immaterial since these are not negligence claims to which the Comparative Negligence or Liability Reform Acts apply.

> [O]ur comparative fault statute, K.S.A. 60-258a, has done nothing to change the common law rule of joint and several liability for defendants in intentional tort actions.

Sieben v. Sieben, 231 Kan. 372, 378, 646 P.2d 1036, 1041 (1982). See, Moran v. G. & W.H. Corson, Inc., 586 A.2d 416 (Pa. 1991) (The Comparative Negligence Act is "by its express terms, applicable only to actions sounding in negligence."); Bowling v. Heil Co., 31 Ohio St.3d 277, 511 N.E.2d 373 (1987) (principles of comparative negligence have no application to a products liability case based upon strict liability); Tulkku v. Mackworth Rees, Div. of Avis Indus., Inc., 101 Mich. App. 709, 301 N.W.2d 46 (1980) (comparative negligence statute does not apply to strict liability case unless contributory negligence would have been a defense).

Most courts that have considered the issue have declined to extend comparative-fault principles to conduct characterized as intentional. E.g., Melendres v. Soales, 105 Mich.App. 73, 306 N.W.2d 399 (1981); Carman v. Heber, 43 Colo.App. 5, 7, 601 P.2d 646, 648 (1979); Stephan v. Lynch, 136 Vt. 226, 388 A.2d 376, 379 (1978); Schulze v. Kleeber, 10 Wis.2d 540, 103 N.W.2d 560 (1960). As a general rule, the Uniform Comparative Fault Act does not apply to intentional torts. Comment, § 1, 12 U.L.A. 44 (Supp. 1991).

In Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982), on a claim for pollution of wells based on strict liability or nuisance per se, this Court declined to require application of the Comparative Negligence Act, explaining that:

> Since liability was properly based on strict liability, the failure of the trial court to give instructions on comparative negligence and proximate cause was not error. Contributory negligence is neither a defense to a

nuisance action, [citation omitted], nor to an action based on strict liability.

The plaintiff in this case alleges two intentional torts: conversion and fraud. Contributory negligence is not a defense. The Comparative Negligence and Liability Reform Acts have no application; rather, the Joint Obligations Act applies.[5]

The attempted "rescission" is of no effect.

The Settlement Agreement, made more than a year before this suit was started, did not come to light until the deposition of Heaton. Plaintiff's counsel was immediately advised that the claims against the defendants had thereby been released. Following the deposition, four months after this case was filed, in an apparent attempt to avoid the impact of the Joint Obligations Act, Heaton signed an agreement titled "Rescission of Settlement Agreement."

There are several things wrong with this attempted "rescission." First, the claims had long before been released and the release served to bar suit at the time suit was filed. Plaintiff could not subsequently avoid the impact of that release by a "rescission." Secondly, there was no consideration for that rescission. Heaton was given nothing. On that occasion, as throughout the trial, Heaton was but the puppet of the plaintiff doing whatever plaintiff desired. This is in keeping with

---

[5]If the Comparative Negligence or Liability Reform Acts did apply, the matter would have to be remanded to the trial court for a determination of the relative fault of the plaintiffs, their employee Heaton, and each of the defendants.

plaintiff's prior "promise to handle" these matters on a "personal basis and out of the courts." (See note at bottom of Ex. 20-P.)

As to the purported basis for the Rescission Agreement, the plaintiff asserts in the agreement that "the Schedule attached as Exhibit A to this Settlement Agreement was not true, accurate, and complete." (Paragraph D of Ex. 29-P.) At trial, Elkington testified that the basis for this attempted rescission was that he learned that the greatest amount of steel sold to Wasatch had come from the shop, that Heaton had received "kickbacks", that Heaton had sold material and traded steel for trailer parts to two other companies (Davis Supply and Mr. Trailer), and that there were "numerous other sales to Wasatch Steel which weren't originally listed." (R. 452 at 148.)

These assertions are contrary to the record. "Schedule A" to the Settlement Agreement (Ex. 22-P) shows no inaccuracy. It was taken from Elkington's own audit of Wasatch Steel's records. The subexhibits--Ex. A-3 through A-8--are Elkington's handwritten notes made when he was at Wasatch. The exhibit itself shows that Elkington was aware of sales in 1983 and 1984 by the question marks noted for these years and the allocation of $5,000 as an estimate. (Ex. 22-P at 8.) The estimate was not far off for an estimate. (The actual amounts were $472.39 in 1983 and $8,309.31 in 1984. Ex. 27-P.) But, more tellingly, Elkington asked about 1983 and 1984 when he was at Wasatch on New Year's Eve. He was told the documents would be made available at a more convenient time and with Heaton's authorization, but he never came back or made further inquiry.

His assertions at trial are equally weak. He claims he subsequently learned of sales to other companies in addition to Wasatch and Allstar. There is no allocation to other companies. There is no evidence of those sales to other companies.

Elkington claims he was not advised about the commissions or "kickbacks," as he calls them. Yet his own notes made on New Year's Eve show a payment to Heaton clearly marked as "commission @ 3¢ x 2848 #." (Attachment A-4 of Ex. 22-P.) He concedes that he and Heaton "very well might have talked about" the commissions before that Settlement Agreement was ever signed. (R. 453 at 12.) Elkington's evasive testimony is not an adequate basis for that "rescission."

He also claimed that he did not know that material from inside the plant had been sold. The only other material was the material cleaned up from the South Yard in 1986. That clean up was completed in December 1986. (R. 452 at 121-122.) All of the 1987 material had to have come from the plant. The 1985 material for the same reason obviously did not come from the South Yard. But even more to the point, Elkington asked Heaton in his second meeting with him clear back in December 1987 "if he had been selling remnant or scrap plate to anybody, and I went through a list of companies that I thought might be purchasers of that plate, and I mentioned the name of Wasatch Steel, and he said he had sold some of the stolen material to Wasatch Steel." (R. 452 at 129.) The only place these cuttings came from was inside the plant.

This contrived effort to sidestep the effect of the prior release is contrary to the record, and any finding based on it cannot stand.

The claims were barred when they were filed, and they were not resurrected by the subsequent rescission.

B. The Claims Are Barred in Substantial Part by the Statute of Limitations

The complaint was not filed until April 11, 1989. It alleges, and damages were awarded for, acts of defendants dating back to 1983. Claims for conversion, fraud, and conspiracy are asserted. Damages were awarded on the basis of conversion. "In an action based on civil conspiracy, the applicable statute of limitations is determined by the nature of the action in which the conspiracy is alleged." Maheu v. CBS, Inc., 201 Cal.App.3d 662, 247 Cal. Rptr. 304, 310 (1988). See, Cimijotti v. Paulsen, 230 F.Supp. 39 (N.D. Iowa 1964), aff'd, 340 P.2d 613 (8th Cir. 1965.) The alleged conspiracy is related to fraud and conversion claims, both of which have limitation periods of three years. Thus, this entire case is subject to Utah's three-year statute of limitations. Utah Code Ann. §§ 78-12-26(2) and (3) (1953).

An action for conversion accrues "upon the happening of the last event necessary to complete the conversion." Becton Dickinson & Co. v. Reese, 668 P.2d 1254, 1257 (Utah 1983). Each of the alleged acts of conversion claimed in this case was complete when the steel was sold to Wastach.

In applying the statute of limitations in a conspiracy case, "each continued invasion of the plaintiff's interest causing loss

and damage is treated as an independent element for limitations purposes, and the statute of limitations begins to run when each independent element arises." Cathey v. First City Bank of Aransas Pass, 758 S.W.2d 818, 822 (Tex.App. 1988). "As a result, a tort committed by a conspirator within the statutory period does not rejuvenate" earlier acts, and any action on the earlier acts is barred. Segall v. Hurwitz, 114 Wis.2d 471, 339 N.W.2d 333, 339 (1983). Similarly, in the context of a continuing civil conspiracy to violate antitrust laws: "[E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages, the statute of limitations runs from the commission of the act." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971). While there is some confusion in the cases in considering application of limitation periods to conspiracy claims and no Utah case on the point has been found, a meaningful application of the statute of limitations requires this approach.

By application of the three-year statute, any claim based on sales prior to August 11, 1986, is barred by the three-year statute regardless of whether the claim is based on a claim or conversion or fraud or conspiracy.

The trial court's Memorandum Decision does not mention the statute of limitations or the effect of the prior release. (R. 273-281.) However, in the 63 findings and 17 conclusions prepared by plaintiff, the court decided the three-year limitation did not apply because Steelco "did not have reason to know and could not with reasonable diligence have learned" of its claims. (R. 350-352,

Findings 46 and 47.) The findings do not explain why plaintiff could not have learned of Heaton's action if it had exercised reasonable diligence. The court said the "hardship that any Statute of Limitations would otherwise impose upon [Steelco] outweighs any prejudice [to defendants] from difficulties of proof caused by the passage of time." (R. 351-352, Finding 47.) But it does not specify what exceptional circumstances justify this "weighing." Alternatively, the court said the limitation was tolled by defendants' alleged conduct in concealing purchases from Steelco. (R. 352, Finding 48.) But it does not say what specific conduct was an affirmative act of concealment.

The limitation period runs regardless of plaintiff's lack of knowledge

The general rule is that the statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action regardless of whether the plaintiff knows of the existence of the cause of action. Becton, 668 P.2d at 1257; Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1384 (10th Cir. 1985) (applying Utah law). Becton recognized limited situations where the running of the statute may be delayed until the plaintiff discovers or ought reasonably to have discovered the claim (the "discovery rule"). As summarized in Maughan:

> Under Utah law, the discovery rule will be applied in three categories of cases . . . . First, in several areas of the law the discovery rule has been adopted by statute. . . . Second, where a party has concealed facts or mislead the potential plaintiff, the statute is tolled until the plaintiff knows or should know of the relevant facts. . . . Finally, "where there are exceptional circumstances that would make application of the general rule irrational or unjust [the Utah Supreme Court] has adopted the discovery rule by judicial action."

Maughan, 758 F.2d at 1384, citing Becton (citations omitted).

The trial court did not here rely on any statute to toll the running of the limitation period, and the first exception does not apply. But further, although subsection (3) of § 78-12-26 (which pertains to actions for fraud) specifically provides for application of the discovery rule in a fraud action, subsection (2), which applies to actions for conversion, provides for application of the discovery rule only as to conversion of branded livestock. The legislature thereby excluded the application of the discovery rule in all other conversion actions.

There was no concealment by defendants

For the second exception to apply, the concealment must be done by the party against whom the claim is asserted. Becton, 668 P.2d at 1257. There is no evidence of any act of concealment by defendants. The only effort at considering the question of concealment is in Finding 48 prepared by plaintiff's counsel, but even this finding speaks only in conclusory terms of "concealment." (R. 352.) It does not indicate anything that either defendant did to conceal other than that nothing was said to Steelco. There was no evidence of any effort to obscure the facts. Wasatch kept full and complete records of every transaction with Heaton. Those records were readily made available for Steelco's examination when it made inquiry. Nothing was excluded; nothing was hidden. The mere fact that Wasatch did not make inquiry of Steelco as to the authority of Steelco's Superintendent does not toll the running of the statute. This would be so even if the defendants were not

justified in relying on the apparent authority of the Superintendent.

For a statute of limitations to be tolled on grounds of the defendants' fraudulent concealment, "there must be an affirmative act committed by the defendant and the affirmative act must be calculated to obscure the existence of a cause of action." Payne v. Stratman, 229 Mont. 377, 380, 747 P.2d 210, 212 (1988).

The "mere failure by a person to disclose a fact concerning a cause of action which arises against him does not suffice to toll the statute unless the defendant owed a duty of disclosure." Russell v. Municipality of Anchorage, 743 P.2d 372, 376 (Alaska 1987). "[T]here must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. There must be some actual artifice to prevent knowledge of the fact, some affirmative act of concealment, or some misrepresentation to exclude suspicion." Unified School District No. 490 v. Celotex Corp., 6 Kan.App.2d 346, 629 P.2d 196, 204 (1981), quoting 51 Am.Jur.2d, Limitation of Actions, § 148. "There must be positive acts of concealment done to prevent detection. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." Tovrea Land & Cattle Co. v. Linsenmeyer, 100 Ariz. 107, 130, 412 P.2d 47, 63 (1966).

The plaintiff's failure to discover larcenous acts of its employees is not evidence that defendants concealed anything, for "[n]ondiscovery and concealment are not the same." Young v. Haines, 226 Cal. Rptr. 547, 718 P.2d 909, 919 (1986).

This Court has explained that "our cases dealing with fraudulent concealment indicate that neither material omissions nor fraudulent affirmative statements are actionable absent a duty to speak the truth." Chapman v. Primary Children's Hospital, 784 P.2d 1181, 1186 (Utah 1989); see also Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (Utah 1980); Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802 (1963). Where there is no fiduciary relationship which would create a duty of disclosure, a claim may be time-barred. Chapman, 784 P.2d at 1186. The trial court here, in the findings prepared by plaintiff's counsel, makes the conclusory assertion that defendants had a duty to disclose. There is, however, no explanation of what fact gives rise to that duty because there is nothing here to have created a duty.

Plaintiff exercised
no diligence

The findings, again in conclusory language and without factual foundation, state that plaintiff could not have learned of Heaton's action by the exercise of reasonable diligence. This conclusion is an attempt to meet the generally accepted principle that "the statute of limitations in a fraud case begins to run when the plaintiff by reasonable diligence could have learned of the fraud, whether or not he actually learned of it." Coronado Div. Corp. v. Superior Court, 139 Ariz. 350, 678 P.2d 535, 537 (1984). Moreover, the "limitation should be tolled for fraudulent concealment only so long as the plaintiff is unable, by reasonable diligence, to discover the facts necessary for determining the existence of a

claim for relief." First Interstate Bank of Fort Collins, N.A. v. Piper Aircraft Corp., 744 P.2d 1197, 1200 (Colo. 1987).

There is no showing of any diligence on the part of Steelco. On the contrary, Steelco left its Superintendent in a position where he could do "almost . . . what he wanted" with the scrap material that plaintiff is now suddenly concerned about. (R. 450 at 184.) Although plaintiff's president is an experienced certified public accountant, there were no internal inventory or audit controls. The loading and delivery was done in broad daylight, during normal business hours, usually while Steelco's second shift was in full swing, always before Wasatch closed at 5:00 p.m. Even on Saturdays Steelco's plant was not vacant--on the occasion that finally triggered an investigation, employees and even the president were in the plant. It is reasonable to assume that Steelco's employees and supervisors were there on other Saturdays. The steel division general manager testified he knew that Heaton regularly worked on Saturdays. Drug addicts were using drugs regularly--every thirty minutes--on the job. Steelco did not give receipts on all cash purchases made by Heaton. Steelco's own trucks made deliveries to Wasatch. Mr. Hurst was over at Steelco on numerous occasions. Steelco's Superintendent was even making stove parts in Steelco's plant and delivering them to Allstar Manufacturing. Plaintiff made not the slightest inquiry until November 1987.

This is hardly the exercise of "reasonable diligence." Even the slightest effort would have enabled Steelco to "discover the facts necessary for determining the existence of its claim for

relief." Piper Aircraft, supra. If Steelco had made any inquiry whatever, it would have found the full facts as it easily did when it did make an inquiry.

There are no exceptional circumstances

For the third exception to apply, there must be such "exceptional circumstances" as to justify departure from the general rule. The finding that the limitation would impose a hardship on Steelco and that defendants would not be significantly prejudiced in offering proof after the passage of time do not amount to "exceptional circumstances." There are here no exceptional circumstances. The cases finding exceptional circumstances all involved extraordinarily peculiar circumstances. See, e.g., Myers v. McDonald, 635 P.2d 84 (Utah 1981) (death of ward not known until after statutory period); Maughan v. SW Servicing, Inc., 758 F.2d 1381 at 1384 (10th Cir. 1985) (applying Utah law, complexity of scientific data, long latency period of the disease).

Failure to file as soon as a claim is discovered is significant. Brigham Young Univ. v. Paulsen Constr. Co., 744 P.2d 1370, 1373 (Utah 1987); Whatcott v. Whatcott, 790 P.2d 578, 580 (Utah App. 1990). Heaton was selling steel from November 1983 to October 1987. (R. 450 at 12.) Steelco claimed to have learned of his thefts in November 1987. (R. 450 at 126, 137; R. 452 at 201.) The complaint was not filed until April 1989.

The claims are
justly time barred

The discovery rule has no application in this case. Under our statute, the discovery rule is not applicable to actions for conversion. There was no act of concealment by Wasatch Steel and no duty to inquire of Steelco. There are no exceptional circumstances to justify suspension of the statute. In the final analysis, it was plaintiff's failure to supervise its own employees, its own lack of diligence, that is responsible for the passage of time, not anything that the defendants did.

A number of the witnesses commented that the details of their acts or conversations occurred "too long ago" to remember accurately. (R. 451 at 186, 204 [witness Chris Williams]; R. 451 at 76, 94, 98, 99 and R. 452 at 7, 18 [witness Volma Heaton]; R. 452 at 205 and R. 453 at 34 [witness Robert Elkington]; R. 452 at 24, 35 [witness Patty Midgley]).

The need for application of the statute of limitations in this case is aptly summarized in Becton, 668 P.2d at 1257:

> The policy heretofore adopted by this Court is that statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." To further that policy, the general rule has been that a cause of action accrues upon the happening of the last event necessary to complete the cause of action. Under that rule, "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." [Footnotes omitted.]

II

The Findings of Liability Are Not Supported by Adequate Evidence in the Record

The trial court stated in its Memorandum Decision that findings had been made by a "preponderance of the evidence." (R. 273.) Fraud and conspiracy must be shown by "clear and convincing evidence." Utah State Dep't of Social Servs. v. Pierren, 619 P.2d 1380, 1381-82 (Utah 1980) (fraud); Crane Co. v. Dahle, 576 P.2d 870, 872 (Utah 1978) (civil conspiracy). Where a conspiracy theory is alleged, the plaintiff has the "burden of presenting clear and convincing evidence supporting his conspiracy theory." More v. Johnson, 568 P.2d 437, 440 (Colo. 1977).

Obviously recognizing inadequacy in its own written decision, the court also stated that its findings were "not all-inclusive" and ordered plaintiff's counsel to prepare findings to support the decision. (R. 273-274.) The court then adopted in their entirety, without the slightest modification, the findings of fact and conclusions of law prepared by Steelco's counsel. In those findings an effort was made to correct the error regarding the necessary weight of evidence. (R. 335.)

Although a finding of conversion can be based on a preponderance of the evidence, the record does not support that finding.

A. The Trial Court's Findings Must be Reviewed With Care

In these circumstances, the trial court's findings should be reviewed with great care.

The trial court abdicated
its responsibility to make
proper and adequate findings

Under Rule 52(a), the court has the duty of making findings of fact and conclusions of law. If the findings are inadequate, the judgment must be vacated. Anderson v. Utah County Board of County Comm'rs, 589 P.2d 1214, 1215-16 (Utah 1979).

Counsel may be invited to submit proposed findings, but these are "no more than informal suggestions for the assistance of the court." Wright & Miller, supra, § 2578. While this Court has deferentially afforded to the trial courts discretion to adopt findings as submitted by the prevailing party, those findings must not be clearly contrary to the evidence. The Court has also cautioned that it does "not recommend that the trial judge 'mechanically adopt' the findings as prepared by the prevailing party." Boyer Co. v. Lignell, 567 P.2d 1112-1114 (Utah 1977). "The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52 . . . because findings so made fail to reveal the discerning line for decision." Kelson v. United States, 503 F.2d 1291, 1294-95 (10th Cir. 1974); See, also, Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 572 (1985); United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-57 (1964). The "practice of verbatim adoption of counsel's findings is now viewed with disfavor." Wright & Miller, supra.

Notwithstanding these cautionary expressions, the trial court made but a perfunctory effort at revealing a "discerning line for decision" and did "mechanically adopt" the findings prepared by the prevailing party. A litigant, particularly in a matter involving

serious allegations as in this case, has a right to expect careful and detailed attention in a bench trial. The Memorandum Decision only emphasizes that that care was lacking here. Even the findings of the plaintiff are in large respect but conclusory statements and contain very little actual recitation of fact from the record. Beyond that, when defense counsel objected to the new findings and raised question concerning the court's misperception of the applicable evidentiary standard, the court expressed his feeling that a judge should "not write a memorandum decision" and that it is just a matter of "going the extra mile" to do so. (R. 455 at 1-3.)[6] Quite to the contrary, it is the judge's duty under Rule 52 to do so. The rule requires that "the court shall find the facts specially and state separately its conclusions of law thereon." (Emphasis added.) The court said that he had all along intended "clear and convincing" but the words of "preponderance" "rolled up." (R. 455 at 2.) These statements in the context of broader comments endorsing another judge's recommendation that a judge should "never" put anything in writing but should "just make your rulings and then tell the plaintiff's attorney or the defendant's

---

[6]The court here also demonstrated substantial hostility to defense counsel by launching into a speech at the commencement of the hearing on objections to the findings before counsel were even permitted to speak and by stating "you are trying to hang me with that." (R. 455 at 3.) On this same occasion, when counsel tried to emphasize the unbelievable nature of the testimony of the witness Chris Williams, the court curtly stopped counsel with the comment that "Well, I have made my judgment, Mr. Garrett. . . . I have made my findings. I don't need you to sit there now and comment to me on that." (R. 455 at 13.) Hostility was evident in other places in the trial. (R. 450 at 124, R. 451 at 182, R. 454 at 127-128.)

lawyer to prepare the findings consistent with the ruling" (R. 455 at 1) are so out of harmony with the Rules of Civil Procedure and the direction of this Court, indeed, so out of harmony with concepts of fundamental justice, that they cannot be left without correction.

Error is more readily found where findings are mechanically adopted

Although it is acknowledged that past practice has been that the mere mechanical adoption of findings prepared by counsel may not in itself be sufficient to upset those findings if they are otherwise entirely adequate and supported by the evidence, those findings will be more meticulously scrutinized than when findings are made by the court itself and show the court's careful and detailed attention in a bench trial.

When a trial court adopts a party's proposed findings, the findings are examined especially critically when deciding whether they are clearly erroneous, and the record as a whole should be reviewed with a more critical eye to insure that the trial court has adequately performed its judicial function. Andre v. Bendix Corp., 774 F.2d 786, 800 (7th Cir. 1985); Ramey Const. Co., Inc. v. Apache Tribe, 616 F.2d 464, 467 (10th Cir. 1980); Hagans v. Andrus, 651 F.2d 622, 626 (9th Cir. 1981), cert. denied, 454 U.S. 859 (1981); Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1408 (D.C. Cir. 1988).

B. The Findings of Fraud and Conspiracy Are Not Supported By Clear and Convincing Evidence

Although asserted in separate counts of the complaint, the claims for fraud and conspiracy are treated with no differentiation in the Decision and are but two sides of the same coin. Both theories require proof by clear and convincing evidence. The fraud count alleges fraud in accepting deliveries of "misappropriated" steel. There are two conspiracy counts. One alleges conspiracy between defendants and Heaton to misappropriate steel, and it is really but the same as the fraud count. Another conspiracy count alleges a conspiracy with Chris Williams to issue "bogus" purchase orders and to pay kickbacks to Ms. Williams.

It is not shown that the defendants knew of Heaton's fraud

The key element to plaintiff's case is the assertion that defendants knew of Heaton's fraud upon his employer. The defendants' only contact with Steelco was through Mr. Hurst. He unequivocally denied knowing of Heaton's fraud until the plaintiff told him about it. Mr. Hurst testified that Heaton told Hurst he bought the steel from his company. (R. 454 at 72.) Hurst knew from the start that Heaton was the superintendent at Steelco; he trusted Heaton and assumed Heaton was acting with the approval of his employer. (R. 454 at 77, 87.) To Hurst, "Heaton represented Steelco." (R. 454 at 87.) Hurst was not well acquainted with anyone else at Steelco and had the impression that "what [Heaton] told me went [with Steelco]." (Id.)

Defendants were not secretive about dealings with Heaton. Heaton sometimes invited Hurst to visit Steelco's plant and showed him material for sale. (R. 450 at 66.) These visits gave Hurst no reason to question Heaton's authority. (R. 454 at 79.) Heaton showed Hurst some scrap steel in the yard and said he owned it. (R. 454 at 83.) At times, the defendants sent their truck, clearly marked with the name "Wasatch Steel," to Steelco's yard to pick up the steel. (R. 451 at 2-3.) It did not occur to Hurst that Heaton might be stealing the materials from Steelco. (R. 450 at 90.)

The first indication to Mr. Hurst that Heaton was under suspicion came in December 1987 when Heaton came into defendants' office and said that he was under investigation by his employer and Hurst might be contacted by someone from Steelco. (R. 454 at 88.) The full extent of this situation was not known until Steelco's president, Robert Elkington, called. (R. 454 at 89, 93.)

Plaintiff's only evidence to the contrary came from the thief himself. At trial, under plaintiff's direct examination, Heaton claimed that with respect to payments for material delivered from the South Yard he told Hurst on a number of occasions, "[Steelco] must not know about this." He did not recall Hurst's exact response but thought Hurst said something like, "It is no problem. I won't say anything." (R. 451 at 7-8.)

However, in his deposition, Heaton had been asked concerning the steel he was selling to Wasatch:

> Q Did you tell [Hurst] that this was Steelco's material?

A When I first started dealing with [Hurst], I told him that I was buying it and reselling it.

Q And that is the only conversation you had along that line, is it?

A That is right.

(R. 451 at 79.) He then affirmed again that the subject was never brought up again. He said once when unloading his pickup at Wasatch an employee had commented, perhaps in a jocular vein, that it "looked like high rate stuff" (inferring it was "hot" or stolen). Hurst said, "No, it is not. He bought it," and Heaton also denied that it had been improperly acquired. (R. 451 at 80.)

Heaton conceded that he had "no agreement with Lynn Hurst or Wasatch Steel to misappropriate material from [his] employer." (R. 451 at 132.)

Thus, as to the scrap cuttings there is no evidence that defendants knew or were ever told that Heaton had stolen them. As to the material from the South Yard, the only evidence of the alleged fraud and conspiracy is the admission of the alleged co-conspirator, Volma Heaton, made after any alleged conspiracy had terminated. Plaintiff's case rests almost entirely on Heaton's allegation that he told Hurst not to say anything. There is no evidence of anything that defendants said or did other than to make payments as directed by plaintiff's Superintendent and to keep a complete and precise record of those payments, the same as they recorded every other business transaction. Even Heaton's statements are first made after his improper acts came to light.

A meeting of minds on the course of action is an essential element necessary to establish a civil conspiracy. Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah App. 1987) cert. dismissed, 771 P.2d 1032 (Utah 1989). A "meeting of the minds" cannot be shown by mere silent knowledge of an unlawful act. More v. Johnson, 193 Colo. 489, 568 P.2d 437, 440 (1977).

For extrajudicial statements of an alleged co-conspirator to be admissible, "independent evidence must establish a prima facie case of conspiracy, or of the defendant's connection therewith." 16 Am.Jur.2d Conspiracy § 69 (1979 & Supp. 1991); see also, Terrell v. Olsen, 378 S.W.2d 719 (Tex. App. 1964); North River Ins. Co. v. Daniel, 101 S.W.2d 401 (Tex. App. 1937).

To be admissible, the acts or declarations of a co-conspirator must also have been done or made while the conspiracy was still in existence. They are not admissible when they occurred after termination of the conspiracy. Williams v. Great So. Lumber Co., 277 U.S. 19 (1928); Starmer v. Mid-West Chevrolet Corp., 175 Okl. 160, 51 P.2d 786 (1935); 16 Am.Jur.2d Conspiracy § 69.

The plaintiff has the "burden of presenting clear and convincing evidence supporting his conspiracy theory." Israel Pagan, 746 P.2d at 793. "This evidence must do more than merely raise a suspicion--it must lead to belief that the conspiracy existed." Id., quoting Dill v. Rader, 583 P.2d 496, 499 (Okla. 1978) (emphasis in original). The evidence is sufficient if it shows that "the circumstances are consistent only with the existence of a conspiracy"; it is insufficient if it "discloses acts just as consistent with a lawful purpose as with an unlawful

one." 746 P.2d at 793. "Disconnected circumstances, any of which, or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking are insufficient to establish a conspiracy." Id., n.9, quoting Dill (emphasis in original).

Defendants were entitled to rely on Heaton's authority

Defendants' dealings with Steelco were entirely consistent with normal business practices. There is nothing unusual or improper in Mr. Hurst's dealing with plaintiff's Superintendent and in relying upon the Superintendent's directions.

"Those who deal with a corporation must deal with agents and have a right to rely on the apparent scope of an agent's power." 2 Fletcher Cyclopedia of the Law of Private Corporations, § 449 (1990). Superintendent Heaton had actual or apparent authority to sell Steelco's "cuttings" to Wasatch. Although Steelco may have an action against Heaton if he converted the proceeds, it has no action against defendants who reasonably relied on Heaton's actual and apparent authority.

Actual authority may be expressed or implied. Zions First Nat'l Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094 (Utah 1988). Heaton had express authorization to sell or "eliminate" the assortment of steel in the South Yard, to buy scrap cuttings for his own use, and to sell those cuttings to other employees. (R. 450 at 126-128, 132-135, 162-163, 191-192; R. 452 at 194.) When he bought steel, he fixed the price himself. (R. 451 at 97-99.) As Superintendent, he was responsible for maintenance, shipping and receiving, and the processing area where steel was fabricated. (R.

450 at 121; R. 451 at 66; R. 452 at 124.) He supervised the shearing, sawing, burning, and forming of various materials that generated scrap. (R. 451 at 66.) He was "directly in charge" of the scrap pile. (R. 450 at 164.) He had the specific duty to use or dispose of the cuttings. (R. 450 at 121-122.)

The sales to defendants were also a natural incident of Heaton's duties as Superintendent. "Implied authority" is "actual authority based upon the premise that whenever the performance of certain business is confided to an agent, such authority carries with it by implication authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized." Zions, 762 P.2d at 1094-95; also see B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216, 1217 (1972). This authority may be implied from words and conduct of the parties and the facts and circumstances attending the transaction in question. Zions at 1094-95. In Frame v. Lanjoma Lumber Co., 173 Pa. Super. 8, 93 A.2d 891 (1953) the engineer in charge of turnpike construction had implied authority to contract for removal of logs. Similarly, Superintendent Heaton had implied authority to sell cuttings from the processing plant and other scrap from Steelco's yard.

The same evidence that tends to show implied authority may also show apparent authority. 2 Fletcher Cyclopedia of the Law of Private Corporations, § 449 (1990). Apparent authority exists "where a person has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first person."

Walker Bank & Trust Co. v. Jones, 672 P.2d 73, 75 (Utah 1983), cert. denied, 466 U.S. 937 (1984).

"It is well settled that when, in the usual course of the business of a corporation, an officer or agent has been allowed to manage certain of its affairs, authority to represent the corporation may be inferred from the manner in which he or she has been permitted by the directors to transact its business." 2 Fletcher § 434. See, Ace Supply, Inc. v. Rocky-Mountain Mach. Co., 96 Idaho 183, 525 P.2d 965 (1974). (Conversion action, general manager has "at least apparent authority to consummate the sale of the tractor"). Herr v. Brakefield, 50 Wash. 2d 593, 314 P.2d 397 (1957) (Conversion of a herd of cattle, partner managing the farm had apparent authority to sell the cattle).

An agent's authority is to be gathered from all facts and circumstances, including the nature and size of the corporation, the kind of business engaged in, and whether the transaction at issue is an ordinary one. 2 Fletcher § 451. A third party need inquire into a corporate agent's apparent authority only in extraordinary transactions. Id. See, Zions, 762 P.2d at 1095; Bradshaw v. McBride, 649 P.2d 74, 78 (Utah 1982).

The sale of cuttings by the superintendent of a steel plant is not unusual. Three other companies, by plaintiff's own evidence, made purchases from Heaton without suspecting any lack of authority. Further, the president of Utah Metal Works Inc. testified that there is a custom in the metal industry to allow employees to sell materials from a "bone yard." (R. 454 at 51.)

Hurst knew from the start that Heaton was Superintendent. (R. 454 at 77.) Heaton occasionally invited Hurst to visit the plant and look at material for sale. Hurst spoke to Heaton there, looked at materials to purchase from the yard, and received deliveries from a plainly-marked Steelco truck. (R. 454 at 77-78.) During these visits, Hurst was given no reason to question Heaton's authority. (R. 454 at 79.) Hurst observed that Heaton seemed to have "no one over him" (R. 454 at 87); his directions were followed in making these sales, fixing the prices for them, and loading the trucks. When Heaton asked that some of the checks be made in his name, he explained that he owned part of the material. (R. 454 at 72, 86.) None of this seemed extraordinary to the defendants or others to whom Heaton sold steel. In fact, Heaton did own part of that steel; it was given to him to dispose of, and other parts of it he had purchased. (R. 450 at 197; R. 451 at 17.)

The rule of apparent authority applies whether the agency is general or special. Fletcher, § 4886. "Persons dealing with a known agent of a corporation have a right to assume, in the absence of information to the contrary, that his or her agency is general." Id. § 434. The rule also applies where the agent abuses or exceeds his authority. Id. § 453. A corporation is bound by even fraudulent acts of its "agents acting in the apparent course of their employment, although it did not authorize or know of the fraud . . . and although it may have been committed by the . . . agent . . . with intent to defraud the corporation." Id. § 4886.

The agent of a grantor has apparent authority to receive payments, even though the agent subsequently converts those

payments to his own use. Reeves v. Jones, 416 S.W.2d 952 (Mo. 1967). Similarly, Heaton had apparent authority to sell the steel. Even though Heaton later "quit paying for some of the material he sold," defendants did not know this and were justified in believing he had authority to sell the steel. (R. 454 at 89.)

$2,300 in commissions does not make a $250,000 conspiracy

The evidence of four commissions requested by Heaton for orders he placed on behalf of Steelco is straightforward. (Ex. 28-P; R. 450 at 77.) These commissions total $2,363.44. It is the only clear and convincing evidence in this case and that is due to testimony and evidence produced by defendants, not plaintiff. Heaton had authority to place the order; Steelco needed additional ballast steel; and Heaton located some through Wasatch. He asked for a commission for arranging the sale and, distasteful as it was, the commission was paid. It was accurately recorded in Wasatch's records. One of the commissions is even shown in connection with payments made to Heaton for purchases of steel and was shown to and noted by Mr. Elkington during his New Year's Eve examination of the records. The others were only shown in the check register, which Elkington did not ask to review on that occasion. (Plaintiff claims that other transactions not otherwise explained in Wasatch's records, totalling $1,728.75, were also "kickbacks." The documents do not show what they were for, but even that additional amount does not justify the sizeable judgment awarded. Ex. 28-P.)

Moreover, this "ballast" steel was sold to Steelco below Steelco's cost for the cobble steel which it supplemented. There

was, therefore, no loss to Steelco. Plaintiff was aware of the purchases and, in fact, complained about the quality of some. It remains that weight was the main thing; the steel needed no special appearance and this steel served the purpose for which it was intended. Heaton saw an opportunity while filling a need for his employer to at the same time make something extra himself.

Even though Mr. Hurst explained at trial that in retrospect he would not object under similar circumstances to a commission being paid to one of his employees who might find needed material at a reduced cost, these payments turned out, in the context of this case, to be unfortunate. But this entire case cannot rest upon whether these payments were ethical. These commissions do not elevate the paucity of evidence directed to the conspiracy issue, nor convert the purchase of scrap steel, to the status of clear and convincing evidence. The case cannot be sustained on this unfortunate occurrence.

The uncorroborated testimony
of a former drug addict and thief
is not clear and convincing

The only other evidence plaintiff has is the testimony of Chris Williams, an admitted drug addict and thief who is such an accomplished liar that she passed the first lie detector test given her. She claims she was paid $6,000 in commissions for arranging purchases of the ballast steel. (See Statement of Facts, supra at 17-18.) There is absolutely no corroborating evidence. There is nothing in Wasatch Steel's records; there is no evidence of bank withdrawals or "cash back" from deposits to cover the payments; there is not even any corroborating testimony from Heaton. Two

days before trial, Ms. Williams destroyed what she claims was a record of the commissions.

The transparency of this testimony is most dramatically demonstrated by Ms. Williams' explanation made in her pretrial deposition that she was paid a total of $4,950 on three specific Steelco purchase orders she claims to have arranged. It was shown at trial that Heaton was paid $2,252.20 in commissions on these very same purchase orders and corresponding invoices. (See, Appendix C to this brief.) There is an unquestioned record of the payments to Heaton; there is no corroborating evidence for Ms. Williams' testimony. As shown in Appendix C, she claims to have been paid more than twice what Heaton was paid on these same transactions. And more, the total of the two commissions would amount to more than half of the total sale price! Having made these specific assertions in deposition (at a time when she purportedly had a record), there could be no retreating at trial even though they amply demonstrate the absurd nature of her testimony.[7]

If the commissions were paid, why would Wasatch regularly record payment of commissions to Heaton but not to Williams? Why would Wasatch pay Ms. Williams greater commissions than Heaton? Why would it pay commissions of such magnitude that it would lose money on the transaction? The testimony of Chris Williams is

---

[7]Counsel's effort to explain to the court the astonishing nature of this witness's fabrication was cut short. The trial court expressed hostility to counsel and told him to address his argument to the Court of Appeals. See footnote 6, p. 46 above.

unbelievable; it is certainly not clear and convincing. It cannot support a damage award for any amount she claims was paid to her, and it cannot be credited as evidence of a fraudulent conspiracy.

The only effort to support this witness's testimony in the face of denials by the defendants was Patty Midgley's testimony that Lynn Hurst said hello to her and Chris Williams at a movie theater. It is not surprising that he would say hello to Ms. Midgley because he had seen her when he was at Steelco on several occasions. Ms. Midgley said he said hello to both together--not only to Chris alone--although on further prodding of plaintiff's counsel she tried to make it appear that the greeting was directed more to Ms. Williams. This testimony is from an employee who knew of the use of drugs at Steelco but said nothing; who knew of Heaton's activity but said nothing until after the round of lie detector tests, and then only after another employee had named her as the source of information. Moreover, her testimony does not verify payment of commissions or kickbacks to Chris Williams. It goes only to contradict Mr. Hurst's denial that he ever knew Williams. The only other evidence is in this same vein--the testimony of Williams and Heaton that on occasion she had accompanied Heaton in his pickup when he delivered scrap to Wasatch.

Summary: There is no
clear and convincing evidence

When the record is examined, the only clear and convincing evidence is that commissions totalling $2,363.44 were paid to Volma Heaton for the purchase of ballast steel which he arranged when his

employer was in need of the steel. It may have been imprudent to pay the commissions, but that does not prove a conspiracy or that Lynn Hurst knew of Heaton's fraudulent conduct in selling scrap steel. If damages are to be awarded for payment of the commissions, that is one thing, but the six figure award of damages on other elements of this case are based on the flimsiest of evidence, not on clear and convincing evidence.

C. There Was No Conversion

While it is recognized that as a general rule even a bona fide purchaser for value from one who has no right to sell goods becomes a converter when taking possession of such goods, this principle implies that the seller of the goods had no authority to sell them but rather stole them. Plaintiff concedes some steel was given and some was sold to Heaton but contends that the rest was stolen. The record is a muddle as to what quantities of steel fit within what category. Heaton obtained good title to the steel given and sold to him. As to that, there can be no conversion.

Plaintiff invested
Heaton with authority

But most important, defendants relied upon the authority with which Heaton acted as Superintendent for his employer. In its Decision the court stated that Heaton was "acting without authority, apparent or otherwise, of Steelco." But no explanation is given. As shown above, Heaton was clothed with authority, and Wasatch was justified in relying upon the authority of Steelco's Superintendent--the man in charge of the surplus material being sold. Where there is authority to sell goods, the purchaser is not

a converter. E.g., Lanjoma Lumber, 93 A.2d 891; Ace Supply, 525 P.2d 965; Brakefield, 314 P.2d 397.

III

The Measure and Calculation of Damages Are Wrong

The errors discussed above were compounded at the trial level by application of an improper measure of damages and by an erroneous calculation of damages even under that measure.

The Memorandum Decision declares the "proper measure of damages [on the conversion claim] to be the retail value of such converted property." (R. 277.) The court agreed that value was $104,438 as advocated by plaintiff in Exhibit 30-P. (R. 361.) This "value" was arrived at by doubling the amount that Wasatch paid for the cuttings. This was assumed to be a retail value based on Mr. Hurst's explanation that in deciding how much he was willing to pay for steel offered to him he calculated about what he would be able to resell the steel for to his retail customer and was willing to pay one-half of that estimated amount. The court found liability for fraud and conspiracy and that damages were $103,967.65. This was arrived at in plaintiff's exhibit by taking the amount paid for the cuttings and adding an 80% profit factor and also adding the amounts paid to Heaton as commissions and the amounts that Williams claims she was paid as "kickbacks." To this the court added $100,000 in punitive damages and attorneys' fees. (Memorandum Decision, R. 278.) The decision ended with the statement that "Plaintiff is entitled to recover damages on any one of the theories stated above." In the findings and judgment

prepared by plaintiff, the award is based on the conversion theory because it was the higher measure. (Conclusion of Law 9, R. 362-363; Finding of Fact 59, R. 357; Exhibit 30-P.)

In considering any monetary award, "[t]he fundamental principle of damages is to restore the injured party to the position he would have been in had it not been for the wrong of the other party." Park v. Moorman Mfg. Co., 241 P.2d 914, 920 (Utah 1952). This fundamental proposition is the standard against which this judgment must be measured, whether based on the fraud and conspiracy theories or on the conversion theory.

Retail value
is not proper

Inasmuch as the court awarded damages on a conversion theory, we first examine the proper measure of damages in a conversion case. "[T]he measure of damages for conversion when property is not returned is the value of the property at the time of conversion, plus interest." Madsen v. Madsen, 72 Utah 96, 102, 269 P. 132, 134 (1928). Also see, Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164, 169 (1971); Henderson v. For-Shor Co., 757 P.2d 465, 468 (Utah App. 1988). Generally, it is the market value of the converted goods which controls. C. McCormick, Handbook on the Law of Damages, 464 (1935). Although retail market value has been used where the owner is a consumer and would resort to the retail market to replace the converted item [Winters v. Charles Anthony Inc., 586 P.2d 453 (Utah 1978)], it must be recognized that "the meaning of fair market value varies with the context in which the standard is applied." Merchant v. Peterson, 690 P.2d 1192, 1194 (Wash.App. 1984).

Here we do not deal with the retail market. "In determining market value, the court must focus on the market to which the damaged party would resort in order to replace the subject goods." Goodpasture, Inc. v. M/V Pollux, 688 F.2d 1003, 1006 (5th Cir. 1982); Restatement (Second) of Torts § 911 (1979). As summarized in the Restatement:

> "[T]he market that determines the measure of recovery by a person whose goods have been taken . . . is that to which he would have to resort in order to replace the subject matter. . . . [T]he consumer can recover the retail price; the retail dealer, the wholesale price. The manufacturer, who does not buy in a market, receives his selling price. Damages for the profits that the wholesale dealer or the retail dealer would normally anticipate from a sale are not ordinarily allowed. . . . [T]he dealer or manufacturer is entitled to damages for any harm done to his business through his inability to obtain substitutes and thus satisfy his customers.

Section 911, Comment a.[8]

Thus, a chemical manufacturer was only entitled to recover the wholesale price of converted chemicals in Chevron Chem. Co. v. Street Indus., Inc., 534 F.Supp. 801, 803-804 (E.D. Mo. 1982). See also, Rosenthal v. Finkelstein, 164 N.Y.S. 41 (1917) (jobber of bicycle supplies can recover only price at which he could replace converted bells, not the bells' retail value).

What possible loss
can plaintiff claim?

Determination of damages on a fraud or conversion theory still requires an examination of the claimed loss to the plaintiff, and

---

[8]Section 927 contains "[s]pecific rules on the measure of recovery when there has been a conversion or destruction of chattels." Section 911, comment a. However, § 911 "defines value with particular reference to that Section." Id.

that requires a determination of the value of the steel which plaintiff claims to have lost.

Throughout the case plaintiff's counsel tried to paint the picture that these "cuttings" or "droppings" sold to Wasatch were of a dimension that would classify them (according to plaintiff's definition) as "remnant" that plaintiff "hopefully" could sell again a second time and not mere "scrap" that went into the scrap tub. There is, admittedly, confusion in the record as to who was saying what when the terms "remnant" and "scrap" were used. To Mr. Hurst, these terms were all synonymous, and he did not draw the fine distinction between the terms "scrap" and "remnant." (R. 450 at 40.) As Hurst explained, "The type of steel that Volma sold me was considered as new remnant, as scrap, as opposed to something that had been used by some other person at some other time. In other words, this was material that would have been generated as a processing process . . . where cuts were made and that type of thing from larger pieces and the remaining type of material would be what I bought from Volma." (R. 454 at 67.) Heaton described the material he brought to sell on the first occasion as "scrap," typically angle iron under 8 feet, plate and shearings" (R. 454 at 68-69),[9] and over the years the structural plates and shearings were what Hurst would describe as scrap. (R. 454 at 70.) The pieces of plate were "all under 10 feet in length. And in widths from five or six inches and less." (R. 454 at 75.) Hurst, having listened to Hansen's definition of "scrap" and "remnant," affirmed

---

[9]See footnote 2, page 6 above.

that he never purchased anything that was not "scrap" according to Hansen's definition, except for the larger rusty pieces sold as part of the South Yard cleanup. (R. 454 at 75-77.) When Heaton loaded his pickup to take material to Wasatch, he would tell Milzarek or "the girl" (referring to Patty Midgley), "I have got some scrap out here." Occasionally they would look over the load and estimate the weight. (R. 451 at 93-94.) Even Elkington, who prepared plaintiff's damage exhibits, conceded that he really did not know what kind of steel Heaton had sold to Wasatch. (R. 452 at 179.)

Thus, in spite of the confusion in the record, except for the large junk items from the South Yard that were hauled on semi-truck to Wasatch, it is clear that the sales to Wasatch were from the cuttings in plaintiff's plant. In spite of the herculean effort of plaintiff to attribute a higher value by a fine distinction of "remnant" as opposed to "scrap," it remains that the steel sold to defendants came in small pieces that fit into the back of a pickup truck (R. 454 at 75) and was pretty clearly "scrap."

One thing is certain: Plaintiff would not have to pay retail value to replace the steel because plaintiff is in the steel businesses and produces "tons and tons" of these "cuttings" or "drops" a month from its own processing plant. Moreover, there is absolutely no record as to how much of even the "remnant" plaintiff was ever able to sell. Plaintiff's only witness on the subject (Hansen) could only say that "hopefully" the remnant could be resold. On the other hand, the tubs of "scrap" were picked up daily by a scrap purchaser. (R. 450 at 151.) (The amount paid,

depending on which of plaintiff's witnesses is testifying, ranged from 1¢ to 2¢ per pound or 3¢ to 5¢ per pound. R. 451 at 87, 121.) And more, Steelco had already been fully paid by its customer not only the retail price (which included Steelco's cost plus a profit markup) of the steel that was "cut" or "dropped" and ended up in the scrap tub or as remnant, but also for the cutting charge that produced the drop in the first place.

The real value of the material was at most the amount the scrap dealer was regularly paying (1¢ to 5¢ a pound) to haul it away. Wasatch paid even more to Heaton, not knowing what Steelco had been getting for it. Wasatch equated the value to itself as one-half of what it could resell the piece for in the market Wasatch had created. It was Wasatch, not Steelco, that created the retail market by being willing to handle these odd pieces, hold them in inventory, and accommodate the little purchaser that Steelco was unwilling to bother with.

To take the price paid by Wasatch and double it (as the trial court did) is a gross distortion of any damage the plaintiff conceivably could have suffered.

There is no basis for
award of attorney's fees

The trial court also awarded attorney's fees of $35,850.00. However, there was no proper basis for an award of attorney's fees under a conversion theory.

Utah follows the "American rule" that each party will bear its own attorney's fees in the absence of a statute or enforceable contractual provision to the contrary. Dixie State Bank v.

Bracken, 764 P.2d 985, 988 (Utah 1988). There is no applicable statute or contractual fee provision.

[I]n the absence of any contractual or statutory liability therefor, attorneys' fees and expenses . . . aside from usual court costs, are not recoverable as an item of damages in an action for the conversion of personal property." 18 Am.Jur.2d § 120 (1985 & Supp. 1991). See, Jenkins v. Bailey, 676 P.2d 391, 392 (Utah 1984); Flynn v. W. P. Harlin Constr. Co., 29 Utah 2d 327, 509 P.2d 356, 361 (1973); Navratil v. Smart, 400 So.2d 268, 273 (La. App. 1981); Harris v. Cantwell, 614 P.2d 124, 126-27 (Or. App. 1980).

Punitive dmages
are not appropriate

Punitive damages of $100,000.00 were assessed against Wasatch and Lynn Hurst personally. The fraud and conspiracy claims cannot stand for lack of clear and convincing evidence. There can be no conversion where the party making the sale was clothed with authority. But even if a conversion claim could otherwise be sustained, punitive damages are not justified in a conversion action unless the defendant's conduct was reckless, wanton or malicious. Amoss v. Broadbent, 30 Utah 2d 165, 514 P.2d 1284, 1287 (1973). "A wrongful act is not in and of itself a sufficient basis to award punitive damages." Id. The mere fact that an act was intentionally or legally wrongful will not support an award of punitive damages. Exxon Corp. v. Bell, 695 A.W.2d 788, 790 (Tex. App. 1985). If the taking was wrongful but not malicious, punitive damages should not be assessed. Fort Smith Iron & Steel Mills v. Southern Round Bale Press Co., 139 Ark. 101, 213 S.W. 21 (1919).

The defendants dealt with a Superintendent whom they reasonably thought had authority to make the sales here involved. These sales continued in the open for a period of several years. If plaintiff's Superintendent did not have authority to make the sales, it cannot be said that defendants acted maliciously in purchasing the steel.

The award of $100,000 in punitive damages is a very sizeable award, being roughly a one-to-one ratio to the compensatory damages if interest is included in the computations. Without interest, the punitive award substantially exceeds the compensatory award. This is based on accepting the correctness of the award as it stands, but if properly discounted by application of the statute of limitations and other factors outlined above, the award would be well beyond the guidelines recently summarized in Crookston v. Fire Ins. Exch., No. 880034, slip op. (Utah June 28, 1991).

The amount of actual damages awarded is only one of the several factors to be considered in assessing the amount of any punitive damage award that might otherwise be justified. Crookston, slip op. at 26. Here we deal with a plaintiff that is itself a very substantial business entity, and there is no effect on the life of the plaintiff. The probability of future recurrence is remote at best--the defendants have obviously learned a very expensive lesson in dealing with representatives of the plaintiff. The circumstances here are such that the plaintiff itself placed its Superintendent in a position to create the unfortunate circumstances involved. The relative worth of the defendants is to be considered. No evidence was submitted as to Lynn Hurst's net

worth, but he had an income, including bonuses, of about $48,000. Wastach Steel is a relatively small business. Its total stockholder equity is only $461,087, including stockholder equity of $156,290 and retained earnings of $304,797. (Ex. 49-P.) The $100,000 in punitive damages is one fourth of this. But when the financial statement is analyzed, the punitive award exceeds all of Wastach's liquidity. As shown by Exhibit 49-P, it had only $82,000 of accounts receivable and cash. For the entire period January through August 1990, Wasatch had a net income of only $71,777, and this does not count substantial year-end deductions for depreciation and other expenses. (R. 454 at 24.) Payment of the punitive award and the total judgment will have a severe, adverse impact on Wastach's ability to continue its business.

This $100,000 award is on the borderline of the ratios recommended in Crookston, but in comparing the circumstances in the case and the wealth of defendants it is excessive, especially in light of prior decisions. E.g., First Security Bank of Utah v. J.B.J. Feedyards Inc., 653 P.2d 591 (Utah 1982). It would seem as important in a bench trial where the judge is the sole determiner of the fate of the parties, as in a jury trial where the judge may consider the appropriateness of a jury award, that the judge should make "a detailed and reasoned articulation of the grounds" for awarding punitive damages. Here we do not have a detailed and reasoned articulation of the grounds for the determination of either the liability issue or the damage award.

In any event, the limitation period must be applied

In any event, regardless of what theory of liability is applied, any award must not include amounts for sales that occurred prior to April 11, 1986 (three years prior to the date of the filing of the complaint). The total of the sales to Wasatch prior to that date is $24,728.88. This is compared to total sales of $13,407.55 in the subsequent period ending with the last sale on October 16, 1987. Similarly, if commissions to Heaton are to be recovered, those commissions paid prior to the three-year limitation period must be deducted.

Summary of damage errors

While in light of the manifest errors discussed above it would appear needless to consider errors in the damage award, a review of the damage errors emphasizes the less than careful attention this case received. To summarize, it was error to calculate damages on a retail basis. What must be considered is the loss to the plaintiff. Plaintiff produced "tons and tons" of these cuttings each month and most were disposed of as scrap for 1¢ to 5¢ per pound. Plaintiff did not establish that there was a practical distinction between so-called "remnant" and "scrap" in the cuttings sold to Wasatch. More importantly, plaintiff offered no evidence to establish what proportion of purchases by defendant would have been "remnant." Further, plaintiff did not establish what portion of its remnant it was able to resell. On the contrary, it was only a "hope" that it could sell any. It was, therefore, not entitled to recover damages on the basis that it could have resold at a

retail value all of what it sold to the defendant. It cannot charge defendant with having purchased nothing but remnants, and it has shown no reasonable allocation.

Beyond all of this, the calculation of damages failed to consider that plaintiff had once sold for full retail value all of the cuttings that were sold to defendant. It thereby had recovered its cost for this steel, a cutting charge, and profit. Thus, even the scrap price that was paid for these cuttings was a windfall.

Next, while it is conceded that there may be some basis for considering the commissions taken by Heaton, even those commissions were more than accounted for by the settlement payments made by Heaton to his employer. But, there is no basis whatever upon which to award damages for the fanciful claims of Ms. Williams.

Finally, any damage award must be reduced by all sales made before the statutory limitation period.

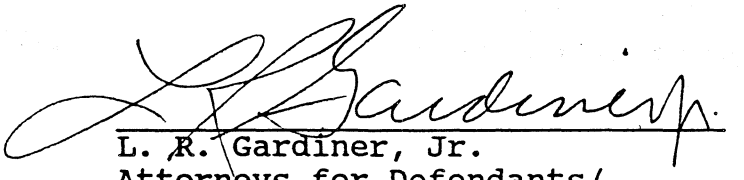
Summary and Conclusion

It is unusual to assert in this Court that error was committed below at virtually every turn, but that is what we here face. Whether that resulted from a too heavily burdened trial court that was unable to give the detailed attention that a case of this type requires, or whatever, it remains that there is here an exorbitant and punitive judgment rendered on the basis of a clearly erroneous factual record, misapplication of the law by disregarding the release of a joint tortfeasor and the Statute of Limitations, and the utilization of an erroneous and miscalculated measure of damages.

The judgment should be reversed and the case should be dismissed.

Respectfully Submitted,

GARDINER & HINTZE



L. R. Gardiner, Jr.
Attorneys for Defendants/
Appellants

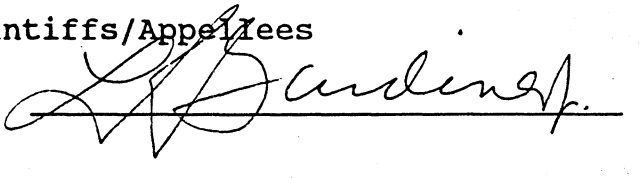
Dated: July 10th, 1991.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Defendants/Appellants was served upon the parties hereto by mailing four copies thereof, postage prepaid, this 10th day of July, 1991, to the following:

Bruce A. Maak, Esq.
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147

Attorneys for Plaintiffs/Appellees



APPENDIX A

Utah Code Annotated

(Statute of Limitations)

78-12-26. Within three years.

. . .

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(Release of Joint Obligations)

15-4-1. Definitions

In this chapter, unless otherwise expressly stated, "obligation" includes a liability in tort; "obligor" includes a person liable for a tort; ""obligee" includes a person having a right based on a tort; "several obligors" means obligors severally bound for the same performance.

. . .

15-4-3. Payments by co-obligor.

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

15-4-4. Release of co-obligor--Reservation of Rights.

Subject to the provisions of Section 15-4-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge co-obligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in Section 15-4-5.

APPENDIX B

CHRONOLOGY

November 12, 1983	First sale of steel by Heaton to Wasatch (466 lbs., $93.20) (Ex. 6-P; Exhibit 27-P)
Last week of November 1987	Plaintiff's president (Mr. Elkington) is advised by other employees of Volma Heaton's conduct.
December 5, 1987 (Saturday)	Steelco employee advises Elkington that Heaton took steel without paying for it to Allstar Manufacturing.
December __, 1987	Volma Heaton identifies Wasatch Steel as a purchaser.
December 31, 1987	Mr. Elkington goes over records of Wasatch Steel showing purchases from Heaton for years 1985, 1986, and 1987; confirms possible sales in 1983 and 1984. (Never makes further inquiry or comes back to look at earlier records.)
March 24, 1988	Settlement agreement between plaintiff and Heaton (Ex. 22-P).
April 11, 1989	Complaint is filed.
May 26, 1989	Deposition of Volma Heaton reveals existence of release.
August 16, 1989	Rescission of Settlement Agreement is signed. (Ex. 24-P.)

APPENDIX C

Amounts Chris Williams Claims to Have
Been Paid on Identical Purchase Orders
on which Volma Heaton Was Paid a Commission

Steelco's Purchase Order	Defendant's Invoice	Invoiced Amount	Comm'n Paid to Heaton (See Ex. 28-P)	Alleged Comm'n to Williams (R. 451 at 191)
43960	154954	$2,497.55	$794.50*	$ 900.00
43859	156274	6,609.60	960.00	2,500.00
44083	159448	4,479.30	497.70	1,550.00
TOTALS:		$13,586.45	$2,252.20	$4,950.00

$7,202.20

(More than 1/2 the sale)

*22,700 lbs. x .035 (See Ex. 28-P)